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In the Matter of:
Distribution of 1993, 1994,
1995, 1996 and 1997 Cable
Royalty Funds

Docket No. 2000-2
CARP CD 93-97

Tuesday,
December 12, 2000

The oral arguments took place at 9:30
a.m., in Room 414 of the Library of Congress' Madison
Building, 101 Independence Avenue, S.E., Washington,
D.C. 20559.

BEFORE:

THE HONORABLE DOROTHY K. CAMPBELL, Chairperson

THE HONORABLE JOHN W. COOLEY

THE HONORABLE MARK J. DAVIS

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Also Present:

Raul Galaz - Independent Producers Group

P-R-O-C-E-E-D-I-N-G-S

(9:45 a.m.)

JUDGE CAMPBELL: We are continuing, for the record, the matter of the Distribution of Cable Royalty Funds, Docket Number 2000-2, CARP CD 93-97.

This morning we will begin with oral arguments on IPG's Motion to Strike Testimony and Preclude Introduction of Evidence.

Before we do, for the record, Mr. Tucci, will you explain who is with you today?

MR. TUCCI: Sure. Michael Tucci on behalf of Program Suppliers. Greg Olaniran just stepped out, I believe, to the restroom. So if we could --

JUDGE CAMPBELL: We can wait for him.

MR. TUCCI: Thank you. I'd appreciate it.

Mr. Popham, Ms. Popham, would you identify yourselves for the record?

MR. POPHAM: I'm Jim Popham, Vice President of MPAA.

MRS. POPHAM: I'm Jo Popham, Legal Assistant.

JUDGE CAMPBELL: Mr. Lutzker, would you do

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1 likewise? For the record, just introduce yourself.

2 MR. LUTZKER: Arnold Lutzker of Lutzker &
3 Lutzker, and Raul Galaz of Independent Producers
4 Group.

5 JUDGE CAMPBELL: Thank you. Good morning.

6 MR. OLANIRAN: Good morning, Your Honor.
7 Greg Olaniran from Program Suppliers.

8 JUDGE CAMPBELL: Thank you.

9 MR. OLANIRAN: And with me is Michael
10 Tucci, also for Program Suppliers, and Jim Popham.

11 JUDGE CAMPBELL: Thank you.

12 (Laughter.)

13 JUDGE DAVIS: Everyone is here twice.

14 (Laughter.)

15 JUDGE CAMPBELL: That's all right. We're
16 glad you're here.

17 To begin the hearing, again, oral
18 arguments on IPG's Motion to Strike Testimony. And
19 since it's your motion, Mr. Lutzker?

20 MR. LUTZKER: Yes. And I had just sort of
21 a procedural --

22 JUDGE CAMPBELL: Absolutely.

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1 MR. LUTZKER: -- matter that I'd like to
2 raise first. Our motion is multifaceted and covers
3 sort of different aspects of discovery. We originally
4 considered filing separate motions, but for ease of
5 sort of paperwork and sort of the mechanics we felt it
6 would be useful to sort of put everything in one
7 motion.

8 For oral argument purposes, I might
9 suggest that we might want to consider these seriatim,
10 rather than sort of me going through the whole thing
11 and --

12 JUDGE CAMPBELL: You do a portion; they
13 respond.

14 MR. LUTZKER: I'll do a portion. I'll do
15 the first issue, and then Greg would have an
16 opportunity, and then we can resolve that, if --

17 JUDGE CAMPBELL: I think that will make it
18 easier to follow.

19 MR. LUTZKER: Okay.

20 JUDGE CAMPBELL: Do you have any problem
21 with that?

22 MR. LUTZKER: No, I don't have any problem

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1 with it.

2 Okay. All right. Then I'll just take it
3 in the order in which it appears in our briefs and
4 focus on the TV Data logs as an initial matter.

5 As the Copyright Office has said
6 throughout this proceeding, in the various orders
7 issued in June, September, and October, there are
8 critical questions regarding both who is represented
9 in this proceeding and what is represented.

10 There are also critical questions
11 regarding the mechanics of the surveys of the data
12 that's collected and submitted to the agency for
13 determination on the merits. Within our analysis of
14 the MPA presentation, one of the essential pillars of
15 their case relates to the TV Data logs that have been
16 collected, analyzed, incorporated, and ultimately
17 involved in their presentation.

18 Now, and this would apply sort of across
19 the board to all of the discovery matters that we have
20 before you. The rules of the Copyright Office of this
21 proceeding are unusual.

22 They're not -- they don't follow strict

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1 federal rules in that if there is not an opportunity
2 for examinations of witness before the hearing,
3 depositions, and the like, we have a single, primary
4 obligation to fulfill our commitment to both the
5 Copyright Office, to the CARP, and to the entities
6 that both we represent and that others represent. And
7 that is to provide the documentation that we use in
8 our case, underlying our case, and related to our
9 case.

10 The course of discovery, as you can see by
11 the various pleadings that have been filed in this
12 case, has been contentious and has been loaded with
13 disputes. One of the areas that we feel is not
14 subject to reasonable dispute is the issue of the TV
15 Data logs.

16 There is no question that in the direct
17 case of the MPAA the factual assertion is made that
18 MPAA ordered 130 television station logs, which are
19 then distilled and used in connection with the
20 presentation of its factual analysis, and ultimately
21 its formulation of how royalties should be
22 distributed.

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1 This is, if anything, the pivot issue of
2 this case. As an opposing claimant, we are entitled
3 to the full breadth of the material that was used in
4 assembling this factual basis for their distribution
5 analysis.

6 We asked early on for all the
7 documentation provided from TV Data. As you can see
8 from the pleadings, one of the difficulties is that
9 these are massive amounts of material that are
10 typically transmitted electronically, that are stored
11 on -- in electronic files, that are made available to
12 parties in electronic form, meaning disks and floppies
13 or CD-ROMs.

14 We have a right under the Copyright Office
15 rules to the 130 television station logs. We asked
16 for them. We were given disks containing logs, but it
17 took a while, it took a long while, in fact, for us to
18 be able to open them. When it turned out we were able
19 to open them, lo and behold we didn't get 130
20 television station logs; we had 82. Actually, there
21 were two disks, and there was -- there was a second
22 disk with 29 commercial stations, as I understand it.

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1 But, fundamentally, there were 82 station
2 logs that we were focused on, because if you added
3 those 20 it would actually be 149, 150 logs that were
4 actually ordered. The 130 logs, we got 42.

5 We have asked for the additional logs.
6 They haven't been provided. We filed a Motion to
7 Compel with the Copyright Office. The Copyright
8 Office granted the Motion to Compel. They still
9 haven't been provided.

10 Under the Copyright Office's longstanding
11 procedures, when parties fail to turn over documents
12 that underlie factual assertions within their case,
13 they fail to provide the documents, those assertions
14 and the implications of those assertions must be
15 stricken from the record. And that's what we focus on
16 in our first portion of our relief.

17 We asked. They weren't provided. The
18 excuses that are provided are really non-availing.
19 The suggestion that MPAA tells us in pleadings that
20 they didn't use these, that they made an assessment,
21 didn't use them, that is not an availing answer. We
22 have a right, as a claimant, as a participant in this

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1 proceeding, to have the record that they worked with
2 in documentation form.

3 They can't tell us what we need to
4 analyze. They can't tell us. They can't frame our
5 case, because we have a right under Copyright Office
6 rules and procedures, to do that on our own
7 initiative. We have a right to cross examine and find
8 out if certain material wasn't used, and we don't know
9 that it wasn't, but if certain material wasn't used,
10 why wasn't it used?

11 What are the implications of that
12 material? And perhaps using that material would
13 provide different results. If it provides different
14 results, it obviously goes to the core of the analysis
15 that they have imposed.

16 Now, there are a few other issues that
17 sort of -- I just -- bottom line, I don't think there
18 is any question we asked; we didn't get. It was
19 compelled; we didn't get it.

20 JUDGE COOLEY: Can I interject --

21 MR. LUTZKER: Sure.

22 JUDGE COOLEY: -- with a question? Did

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1 the Copyright Office order the production specifically
2 of the 48 what's been called missing station logs?

3 MR. LUTZKER: The Copyright Office ordered
4 the -- compelled the delivery of 130 logs. The fact
5 that 48 were missing was not known to IPG until it
6 opened the files, and the Copyright Office never dealt
7 with that issue. One of the questions is, you know,
8 this is time barred, or it's already been ruled upon
9 in the Copyright Office. That's not the case.

10 The Copyright Office has never been faced
11 with this fact. It has simply ordered -- in June it
12 ordered the compulsion of these documents. We filed
13 a motion based upon the failure to have these -- these
14 and other records made available. When they were made
15 available, they were not accessible at the time our
16 motion was filed. We did not know what documents were
17 in the electronic file.

18 Nevertheless, by the time the Copyright
19 Office issued its ruling -- and the ruling that we
20 asked for, which was given in September, related to
21 interpretive and analytic data that TV Data would have
22 supplied to MPAA, which had nothing to do with the

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1 missing 48, because we thought at that point in time
2 that we had them.

3 JUDGE COOLEY: Is it your position that
4 the Copyright Office has already made a determination
5 that all 130 station logs really satisfy the
6 requirement of supporting the direct testimony of
7 their witness?

8 MR. LUTZKER: That's our position. I
9 mean, as a practical matter, their direct case says,
10 "We ordered 130 logs. We analyzed these logs, and we
11 produced our result." That's what their direct case
12 says.

13 The Copyright Office, in June, in their
14 order the 28th of June, said, "Deliver the 130 logs."
15 At no point was that challenged, contested. It was
16 said, "We will deliver the logs." The logs that were
17 delivered were 82 logs. Period. It wasn't like, "Oh,
18 we made a mistake. We want to amend. We want to
19 change." At no point was that done.

20 And by the compulsion of the Copyright
21 Office, the 130 logs are part of their underlying
22 documentation, even if they don't use it.

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1 The Copyright Office has explained in
2 their October 10th order, indicated that -- and this
3 is a point that will come up sort of perhaps
4 repeatedly during the course of this discussion this
5 morning -- even if documents are not directly relied
6 upon by a party, they still may be discoverable
7 because of the interrelationship of those underlying
8 documents to the foundation of the case.

9 Now, in our view, one does not order 130
10 documents, 130 television station logs, for no reason
11 relative to this case. One does not state in a direct
12 case that one has ordered that unless it bears some
13 relationship to the analysis that's ongoing.

14 We are handicapped. Our hands are tied
15 behind our back, and we are forced to accept the
16 explanation of the MPAA as to what logs it has, when
17 they will be sent, and that's not the way the
18 discovery rules work. We have precious little
19 opportunity here to conduct full procedures as one
20 would in a federal trial under the federal rules.

21 Nevertheless, the MPAA helped write these
22 rules by comments and testimony over the years.

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1 They're well aware of them, and we're sort of caught
2 in a situation now where there is no -- in our view,
3 there is no rational explanation why these haven't
4 been provided.

5 And in the face of the June order that
6 compels 130 logs, in the absence of a request for
7 reconsideration of that order, in the delivery of logs
8 in an electronic form that were inaccessible until
9 late in the proceeding, and after all relevant motions
10 were filed to the Copyright Office, we are able to
11 discover for the first time that 48 logs are missing.
12 Out of 130, that represents more than a third of the
13 logs.

14 JUDGE COOLEY: Do you need these 48
15 station logs to cross examine --

16 MR. LUTZKER: Absolutely.

17 JUDGE COOLEY: -- the witness?

18 MR. LUTZKER: Absolutely. I mean, we are
19 entitled to them. They say in their direct case, "We
20 ordered 130 logs." Now, they use 82 stations in their
21 sample. Okay. Why do you use -- why have you ordered
22 130 and you use 82? Well, they made some rational --

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1 presumably rational decisions and analysis as to why
2 they sort of didn't need 130 stations in their
3 analysis.

4 And, you know, one of the things that's --
5 there are a handful of stations that, as will be shown
6 later, have sort of significant impact based on the
7 number of distant signals carried. But then the
8 numbers drop off dramatically, and after the first,
9 you know, five or 10 stations you're dealing with a
10 large mass of stations.

11 And the fungibility and interchangeability
12 and expansion of the documentation becomes a very
13 critical component of the ultimate analysis. Programs
14 that are carried on those missing 48 don't show up in
15 the survey if they're not carried on the other 82.

16 In many cases, that is -- that can be the
17 situation. We are allowed to cross examine based upon
18 that information. It may be that market impact varies
19 based upon the particular stations. Is there a rhyme
20 or reason to the particular stations that haven't been
21 counted versus the ones that are in the survey? The
22 station logs are a window on that.

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1 And I would add, when this very issue was
2 posed by MPAA against IPG early in the case, and there
3 was a mistaken understanding -- and I'll explain that
4 -- that IPG had studied 167 stations and delivered --
5 it was alleged that we delivered 99 station logs --
6 well, it turned out, in fact, we delivered all of the
7 station logs. There were missing logs repeatedly, but
8 they were, in fact, delivered, and the Copyright
9 Office so acknowledged in a later order.

10 But in that situation, MPAA insisted that
11 the failure to deliver those missing 60 logs, 67 logs,
12 whatever it was, justified wiping out our use of that
13 material in our direct case. And they had a right to
14 do that. They had a -- they were right because they
15 did deserve that material.

16 If we researched it and made conclusions,
17 for whatever reason, that this material should not be
18 included in our case, that's got to be relevant to
19 you.

20 You've got to know it's really --
21 discovery helps you reach the conclusion. We pose the
22 questions, and ultimately you're the ones that are

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1 going to make the decision. If we don't have the
2 material that we need to ask the questions in the
3 analysis, then your decisionmaking progress is
4 implicated.

5 And that's why the discovery process, even
6 though it's limited, has a critical value in this
7 proceeding. And in our view, there really isn't any
8 excuse. I mean, in some ways it's harmless error.
9 They didn't use these logs. What's the big deal?

10 To us, first of all, there is a procedural
11 big deal, number one. Number two, as I said, cross
12 examination leads to areas that can be unpredictable
13 until you look at the material. And we are entitled
14 to look at that material.

15 And so, I mean, I think looking at the way
16 they approach our case, this has a parallel. And if
17 they were prepared to say to the Copyright Office in
18 a Motion to Strike, "Remove all of our TV Data logs,
19 because we didn't provide the missing 67," then fair
20 is fair. We did provide those, and so the claim was
21 not grounded. But in this case, there is no question
22 that they haven't provided them.

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1 JUDGE COOLEY: Okay.

2 MR. OLANIRAN: Good morning, Your Honors.
3 Greg Olaniran.

4 Before I respond to Mr. Lutzker's points,
5 I just wanted to sort of get at a couple of discovery
6 principles that guide the discovery in this
7 proceeding.

8 The first one is that discovery is limited
9 only to documents that a witness relies upon for
10 factual assertions which he doesn't have a clear
11 memory of, which means that when the witness doesn't
12 rely on that it's not discoverable. Now, it doesn't
13 mean that if you think the witness should have relied
14 on these, or you knew that a document existed which
15 the witness might have relied upon, or anything of
16 that sort.

17 The standard is, if the witness relies on
18 a document for factual assertion in their testimony,
19 then it has to be produced. If the witness did not
20 rely on it, it is not required to be produced.

21 Now, speaking directly to the Copyright
22 order, which IPG believes governs this particular

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1 issue, I believe it's the June 28 order, on page 11.
2 The line that they seem to be hanging their hats on
3 reads, "Apparently, the TV logs purchased from TV Data
4 for the 130 stations are part of the CDC database."

5 To the extent that they are, their
6 production is covered by Ruling 12, which meant that
7 we needed to produce them, which meant that because of
8 the representations that IPG made to the Copyright
9 Office, the Copyright Office believed that the 130
10 stations were a part of the CDC database, which
11 actually is not true.

12 To sort of give you an idea how this whole
13 issue came to be, Ms. Kessler's testimony refers to
14 130 station logs that MPAA routinely purchases from TV
15 Data on a regular basis. Now, that doesn't mean that
16 they purchase -- MPAA purchased 130 stations for the
17 purpose of this litigation. MPAA has a standing order
18 with TV Data for 130 stations.

19 We use them for a variety of purposes --
20 satellite distribution, cable distribution,
21 enforcement purposes, and a multitude of issues. It's
22 just a standing order for station logs to be delivered

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1 to MPAA or to whom MPAA directs them to deliver the
2 stations to.

3 The stations that were produced, the 82
4 stations, are the stations that Ms. Kessler relied
5 upon for her testimony, to the extent that she relied
6 on those stations. So I just wanted to clear that up.

7 Mr. Lutzker mentioned 149 and 29. I'm not
8 sure where those numbers came from. I'm going to
9 stick to the three numbers that we know -- the 82,
10 which are the commercial stations that we provided
11 data on; the 102, which is in one of IPG's exhibits,
12 which actually is an addition of data on non-
13 commercial stations which are not relevant for
14 purposes of this hearing; and the 130, which is the
15 one number that appears once in Ms. Kessler's
16 testimony.

17 As to the issue of the TV Data logs
18 itself, this Motion to Strike Testimony is late. The
19 September 13th order, on page 3, says if IPG has any
20 concerns with the TV Data data they have to petition
21 the CARP within seven days of initiation. The CARP
22 initiated -- was initiated on October 17th. They

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1 didn't do that. They had the data at that point.

2 Now, there were other issues as far as
3 whether there were any explanatory documents, and I
4 direct you to page 3 of the order, which -- and the
5 first full paragraph which says, "With respect to TV
6 Data logs, Program Suppliers shall inform the library
7 no later than September 20, 2000, whether
8 correspondence and other documents discussed in the
9 logs exist."

10 They were not talking about the logs,
11 because IPG had the logs by then. That was the issue
12 at that point, as we pointed out in our brief. So the
13 issue of missing stations is time barred.

14 Secondly, we believe that order also
15 addressed the issue of whether or not any additional
16 documents needed to be produced at all. If the
17 Copyright Office thought at that point that the TV
18 Data logs were still an issue, they would have said we
19 needed to produce it. They didn't raise it at that
20 point. The only issue that they were raising at that
21 point was whether or not there were any explanatory
22 documents.

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1 We informed the Copyright Office that
2 there were no explanatory documents, and that was the
3 end of the issue.

4 JUDGE COOLEY: Mr. Olaniran, on that
5 point, I believe that IPG is arguing, in their brief
6 anyway, that they couldn't open the electronic files
7 until about, I don't know, after -- on or after
8 October 24th of this year.

9 MR. OLANIRAN: Actually, I'm not sure
10 that's -- they may have argued that point, but at that
11 point, with the Copyright Office, opening the TV Data
12 logs was not an issue. They had had it for quite some
13 time, and I think we pointed out in our brief, too,
14 that they had said that they couldn't open it. But I
15 don't think that's entirely correct.

16 JUDGE COOLEY: Okay.

17 MR. OLANIRAN: As to the issue of whether
18 or not the 48 "missing" stations are producible at
19 all, they are not, and they are not because of the
20 standard. Ms. Kessler did not rely on that for her
21 testimony. When they asked us for the documents that
22 she relied on in her testimony, we produced 82

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1 commercial stations.

2 JUDGE COOLEY: Can you tell me, if you
3 know, how that selection was made. In other words,
4 how were the 82 picked from the 130? What criteria,
5 if any, were used?

6 MR. OLANIRAN: I believe one of the
7 criteria that was used was stations that had maybe
8 80,000 plus subscribers, and we produced a document to
9 that effect. And so the documents that are related to
10 the stations that we relied on for her testimony have
11 been produced.

12 I think the reason this is confusing is
13 because the Copyright Office said apparently there are
14 130 stations in the CDC database. Well, CDC manages
15 pretty much the entire electronic database for MPAA.
16 It doesn't mean that everything in the CDC database is
17 relevant to this proceeding. And when we order --
18 when MPAA orders TV Data data from TV Data they don't
19 order it for '97 cable royalties. They order -- it's
20 a standing order that they could use for a multitude
21 of purposes.

22 JUDGE CAMPBELL: It's a bulk order, for

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1 example.

2 MR. OLANIRAN: So maybe, if anything at
3 all, Ms. Kessler was making a reference to, you know,
4 to only order X number of station -- station logs from
5 TV Data data. And that's all there was.

6 The documents that -- the stations that
7 were relied upon were the 82 stations, and those have
8 been produced.

9 JUDGE CAMPBELL: For example, perhaps
10 you're talking about, for clarification purposes here,
11 there's a bulk order annually perhaps. You use the
12 information for a variety of reasons. And for the
13 purposes of this type of cable royalty distribution,
14 the 82 were the ones that were relevant. The other
15 ones may not have been relevant for this type of
16 purpose. Is that what you're saying?

17 MR. OLANIRAN: That's absolutely correct.
18 And to even be more specific, 102 stations were
19 actually sent to Nielsen for study purposes -- 20 non-
20 commercial and 82 commercial. And when it was sent to
21 Nielsen, the anticipation was not that it was going to
22 be used for this. Non-commercial stations, for

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1 example, are relevant for their own purposes, but
2 they're not relevant in this proceeding. But they
3 were sent.

4 And you will see in a number of the
5 exhibits where they get 82 stations -- data on 82
6 stations, and in another instance they get data on 102
7 stations. The reason is that if the data came
8 directly from CDC, after CDC has used what's relevant
9 for the purposes of this proceeding, they will get
10 data on 82 stations.

11 If it's an original disk from Nielsen,
12 which CDC never did anything to, they would probably
13 get 102 stations.

14 JUDGE CAMPBELL: Far more data than you
15 would need.

16 MR. OLANIRAN: Right. So -- I mean, so
17 basically, again, the standard is there is not
18 anything that Ms. Kessler relied upon in her testimony
19 that has not been produced. The answer to that is no.

20 JUDGE COOLEY: Mr. Olaniran?

21 MR. OLANIRAN: Yes.

22 JUDGE COOLEY: The last order I think that

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1 was entered by the Copyright Office is dated
2 October 10th of this year. And just to refresh our
3 memory here, it says in this order -- and I'm reading
4 from the brief of IPG, reply brief, page 7. "It does
5 not follow that a witness must specifically consult or
6 rely upon a particular document in making a factual
7 assertion before that document becomes discoverable.
8 It does not matter if the witness did not rely on that
9 document in making the assertion, or even knew that
10 the document existed.

11 "How far one goes with this, meaning how
12 many documents must be produced to trace the origin of
13 a particular number or statement, depends upon the
14 cost associated with producing those documents
15 relative to the importance of the number or statement.
16 But it is not, in this example, a defense to a
17 discovery request to assert that the witness did not
18 rely on or see the document requested."

19 Now, how does that apply to this
20 situation?

21 MR. OLANIRAN: I'm glad you brought that
22 up, because they have actually done -- they have made

1 an attempt to sort of mischaracterize the
2 applicability of that order.

3 As an initial matter, that is the order
4 that resulted in an October 11th telephone conference
5 in which the Copyright Office partially reversed
6 themselves and clarified it. It is true that a
7 document, to the extent that it's relied upon by the
8 witness, is discoverable. But if the witness does not
9 rely on the document, it's not discoverable.

10 I don't disagree with that principle. The
11 point in this particular issue is Ms. Kessler did not
12 rely on the so-called missing stations. And if you
13 think about it, the remedy for not producing a
14 document that you rely upon is striking the testimony
15 that's related, to that -- to that -- to the
16 particular document.

17 Well, there's no testimony relating to the
18 so-called missing stations. So if you think about the
19 remedy that -- I know the remedy that they're asking
20 -- that is to strike everything -- well, that's not
21 what the rule says. The rule says if there's a
22 document that you rely on and you don't produce it,

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1 then that testimony that's related to those documents
2 is -- you can ask that it be stricken.

3 But there's no testimony in Ms. Kessler's
4 testimony -- there's no assertion in Ms. Kessler's
5 testimony other than that one number. And if you
6 think about it, if you strike the number 130,
7 everything goes away. So if they want to strike the
8 number 130, we don't have a problem with that.

9 JUDGE CAMPBELL: Because it still doesn't
10 affect your case.

11 MR. OLANIRAN: It doesn't affect the case.

12 JUDGE CAMPBELL: Because you have the 82
13 which --

14 MR. OLANIRAN: Because the numbers that we
15 relied on, the data have been provided.

16 JUDGE COOLEY: One question. You still
17 have this data available, right? The 48 station logs?

18 MR. OLANIRAN: To be quite candid, I don't
19 know what the state of the data is. All I know is the
20 data that she relied on for her testimony, we provided
21 it. I mean, again, it's a standing order that it's
22 used for a variety of purposes.

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1 JUDGE COOLEY: Well, the reason I asked
2 the question is, I don't know how we're going to rule
3 on this, all right? But if -- did ask for, you know,
4 striking testimony, and so forth, but there might be
5 another remedy here which might be order production of
6 it.

7 The question I have is, is it in
8 existence?

9 MR. OLANIRAN: I honestly don't know.

10 JUDGE DAVIS: Excuse me. Could you let
11 the record reflect that Ms. Kessler entered the room?
12 Thank you.

13 I have a brief question that you may or
14 may not be able to answer. How many TV stations are
15 there?

16 (Laughter.)

17 MR. OLANIRAN: I can't answer that
18 question.

19 (Laughter.)

20 JUDGE DAVIS: Ms. Kessler, how --

21 MS. KESSLER: I believe there are -- are
22 you talking about broadcast stations in the United

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1 States or -- tell me the focus of this question.

2 JUDGE DAVIS: Yes, broadcast stations in
3 the U.S.

4 MS. KESSLER: I think 1,500, plus or minus
5 a couple hundred. Of those broadcast stations, maybe
6 700 plus are carried under any circumstance by cable
7 systems; within that group, maybe 500 plus carried as
8 distant signals. If you want precise answers, I can
9 find them and bring them back to you.

10 JUDGE DAVIS: Thank you. That's
11 sufficient for now.

12 MR. OLANIRAN: Just in closing, just -- I
13 mean, just so you understand, even IPG produced
14 documents from TV Data. And to the extent we have
15 never said, for example, "Give us your entire orders
16 with TV Data," because IPG, as Mr. Lutzker said
17 yesterday, is a media entity and they use the data for
18 a variety of purposes.

19 And to clarify the issue that Mr. Lutzker
20 also referred to earlier about they produced all of
21 the documents, the issue in our Motion to Strike was
22 never the number of stations. We wanted to know how

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1 they got 99 -- how they got the 99-station sample,
2 because the testimony talks extensively about 166
3 stations. And it does say from the 166 we have a
4 99-station sample.

5 And our question was directed specifically
6 at, how did you arrive at 99? Did you rank it one
7 through 10? Did you go 10 to one? Tell us how. We
8 know the criteria; we just didn't know how you applied
9 it. That was the issue. The issue was never, "We
10 have to have your station logs." So that is actually
11 the mischaracterization of what the issue was in that
12 particular case.

13 In closing, all I'm saying is all of the
14 documents that Ms. Kessler relied on for her testimony
15 have been provided to IPG. And to the extent that she
16 didn't rely on the 48 stations, those documents should
17 not be required to be produced.

18 There is nothing that they have asked for
19 related to Ms. Kessler's testimony that we have not
20 provided to them in this matter.

21 MR. LUTZKER: Let me just try to address
22 a few things. First, with respect to the issue of

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1 time barred and the concern of the Copyright Office,
2 clearly the Copyright Office understood at the time
3 the order in September was issued that IPG had not
4 accessed these documents.

5 It had -- it was -- I'll say it in the
6 vernacular -- sick and tired of having a situation
7 where material was provided in a format that a
8 claimant could not access, and it said to the MPAA,
9 "Provide this documentation in a format that can be
10 accessed." Period.

11 And then, in recognition of the problems
12 that IPG had, it was saying in effect to IPG, "If you
13 don't have access to the material, we want you to go
14 to the CARP, and in the first week that the CARP is in
15 business we want you to ask for an order, because
16 enough is enough. We're not going to have this."
17 That's what that order addressed.

18 Now, IPG had opened the material; and,
19 therefore, the issue of going to the CARP and asking
20 for the order was irrelevant from our point of view.
21 If you recall, too, when we had our initial meeting
22 here, the procedure that was established was that

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1 motions to dismiss and strike would be filed
2 contemporaneously by both parties on November 20th.

3 There was never an understanding that IPG
4 had an obligation at that point to file a motion with
5 respect to documents. We're not dealing with the
6 documents with respect to TV Data that were not
7 accessible. We're not dealing with the documents that
8 were provided. We're dealing with documents that
9 weren't provided. That's the critical question.

10 And from our point of view, there is no
11 issue as to the timeliness of the motion. There is no
12 issue as to the substance of the motion. The
13 quotation that you made, Mr. Cooley, I think goes
14 directly to the point of the reliance of -- the
15 reliance argument that MPAA has stated in various
16 aspects of this case.

17 You don't have to specifically rely upon
18 a document. The Copyright Office said so. Now, this
19 -- and in that order, and it's the issue that we'll
20 get to next as well, because it was a major immediate
21 concern of the MPAA that the release of the
22 certification reports associated with the

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1 representation agreements was something that they did
2 not want to disclose, for whatever reason. Okay?

3 So they conduct -- after the Copyright
4 Office issues this order, which is basically seven or
5 eight days before the CARP is going to be empaneled,
6 with a compulsion on October 10th to deliver documents
7 by the 13th of October. So they have two or three
8 days to sort of get their act together.

9 There's a telephone call that is organized
10 by MPAA at which point Bill Roberts, myself, and Greg
11 Olaniran are on the telephone call to discuss this
12 very issue of the obligation of MPAA to provide the
13 certification reports. No mention is made about TV
14 Data or other issues, but just with respect to the
15 certification reports.

16 The core point -- and as I think we
17 explain in our brief, the process that was undertaken
18 then greatly disservices IPG, the Panel, as well as the
19 MPAA. Oral telephone conversations after the fact, no
20 recordation, there are differences of opinion with
21 respect to what was done, how it was done.
22 Fundamentally, we have a citation in our brief to a

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1 case that goes to sort of the binding -- the nature of
2 the binding precedent of oral telephone conversations,
3 or oral conversations not recorded.

4 There could have been a transcript made.
5 There wasn't a transcript made. It was a call not
6 initiated by IPG.

7 The core concept -- and I will concede
8 that during the course of the conversation, based upon
9 representations made by Mr. Olaniran, Bill Roberts
10 said, "With respect to the fact that Ms. Kessler did
11 not rely upon these documents with respect to
12 preparation of Exhibit 3, they were not compelled."

13 I am going to get to other aspects of that
14 at a later point, but I don't think it is fair to
15 necessarily hold Mr. Roberts to that ultimate
16 conclusion in the light of all of the documentation
17 and all of the orders that the Copyright Office has
18 issued to date, because by the very nature an oral
19 conversation does not permit -- there's no briefs,
20 there's no paperwork that we're dealing with.

21 We're dealing with a telephone call which
22 lasted probably 15 minutes at most, going back and

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1 forth, at the end of the day. I certainly accepted
2 whatever he was going to say, but not necessarily
3 agreeing with either what was said or with the result.

4 And to bind a party in this proceeding,
5 with this type of record and documentation, to a last-
6 minute, what I characterize as almost a frantic phone
7 call because they don't want to provide these
8 documents for some reason, strikes us as something
9 that this Panel has to put in context.

10 If you want to give it credibility, you
11 must give it credibility in the context in which it
12 comes. The written order, which comes out from the
13 Register's Office, is the official documents of the
14 Copyright Office. The telephone conversations with
15 staff, even though staff contributes to these
16 documents, the process of the Copyright Office
17 resolving its determinations for written documentation
18 is obviously more rigorous than a telephone
19 conversation.

20 I'd like to add one other sort of critical
21 point. It was just now stated that the 82 stations
22 were developed based upon a list of stations that have

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1 more than 80,000 distant subscribers. And, frankly,
2 we weren't prepared -- or else I'd have extra copies
3 of this, and I will provide these extra copies later
4 to the Panel.

5 But I will identify for the record one of
6 the documents we received in discovery -- this was one
7 of the early documents that was provided in relation
8 to the analysis that was made -- it's a February 1,
9 1999, document from -- presumably, it comes -- it's a
10 computer printout, so I assume it has a source of
11 Cable Data Corporation.

12 And it identifies stations, TV stations
13 which exceed 80,000 distant subscribers. And the
14 title continues, when F1/F2 systems are included.

15 This document lists 131 stations. This is
16 the document that was, we believe -- although we
17 cannot verify -- was the basis upon which -- and
18 certainly relates to the number associated in the
19 direct case of the MPAA.

20 JUDGE COOLEY: Are there any two stations
21 on there that -- have you made that check?

22 MR. LUTZKER: It's our understanding that

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1 they are. But until we had the full documentation,
2 sort of final analysis, we -- it does appear that they
3 are here, I'll say in the main, and if -- I don't know
4 if there are any exceptions to it or not.

5 JUDGE COOLEY: Have you shown that
6 document --

7 MR. LUTZKER: Well, this document
8 originates from them.

9 JUDGE COOLEY: I understand, but --

10 MR. OLANIRAN: I don't know what --

11 JUDGE COOLEY: -- they've turned over a
12 lot of documents.

13 MR. LUTZKER: Okay. So when we're dealing
14 with the 80,000 database, 80,000-station database --
15 and, remember, that document originates in 1999,
16 February of '99. So, presumably, there is a period of
17 time within which the documents are ordered.

18 Our view is 130 documents referenced in
19 this proceeding are fundamentally part of their case.
20 Whether they are specifically relied upon or not, they
21 are part of their data. They are part of the
22 documents that were compelled to be delivered.

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1 The issue at this point in time is not,
2 can they go back and rectify the failure to deliver,
3 having been told to deliver these documents, having
4 been asked for on a multiplicity of occasions, having
5 been resisted aggressively through the course of this
6 proceeding.

7 The issue is, were these documents asked
8 for? Should they have been provided? Failing to
9 provide them, what is the appropriate remedy with
10 respect to striking the language from the direct case?
11 Merely striking the reference to 130, and editing it
12 to 82, in our view is a totally unsatisfactory
13 solution, which allows for a disregard of the orders
14 of the Copyright Office. And we don't think that
15 that's the type of precedent that you would like to
16 set.

17 JUDGE COOLEY: Could you clarify for me,
18 if you know, what date you were able to --

19 MR. LUTZKER: Yes.

20 JUDGE COOLEY: -- open the electronic --

21 MR. LUTZKER: Okay. It was sometime in
22 early September. It was -- it post-dated -- we filed

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1 a motion in August for interpretive and analytic
2 documentation from TV Data to either Cable Data Corp
3 or MPAA. And that interpretive and analytic data, not
4 additional TV logs, was the essence of what the ruling
5 addressed.

6 At the time, we indicated we had the TV
7 Data logs in the electronic format which were
8 inaccessible, and we were still working with Cable
9 Data Corp and MPAA. And there was an exchange of
10 efforts to try to, you know, open those documents, and
11 IPG retained, you know, special software consultants
12 in Texas to try to get access to the documents.

13 So efforts were undergoing, even though
14 they had not been successful at that point. They were
15 ultimately successful before the order was released,
16 but it was not reflected in the paperwork.

17 Okay. Added to the fact that the -- the
18 data -- the TV Data logs were provided -- CDC provided
19 a zip disk on August 29th, so the delivery proceeded
20 then. The ability to open it sort of -- it took
21 additional time.

22 MR. OLANIRAN: May I respond to a couple

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1 of the points?

2 JUDGE CAMPBELL: Please do.

3 MR. OLANIRAN: On the question of this
4 document that they said was produced in discovery that
5 lists 131 stations, I think that is inconsistent with
6 what I said earlier that we have a standing order with
7 TV Data data to get the station logs for a certain
8 number of stations.

9 I suppose that probably includes also non-
10 commercial stations and stations that we order for a
11 variety of reasons. So it's no surprise that it has
12 that many stations on it.

13 As far as when IPG has asked us for the TV
14 Data data, if you look at Exhibit G of our opposition,
15 on the very last -- Exhibit E, I'm sorry -- of our
16 opposition, the very last page, you will see an
17 activity log that CDC kept on their interactions with
18 IPG.

19 If you look at this date, August 22, 2000,
20 CDC sends IPG 1997 TV Data logs in DBASE-III format,
21 because IPG had difficulty reading the DAT format.

22 August 29th, sent 1997 TV Data logs again,

1 due to apparently damaged/corrupted data.

2 September 15th, sent 1997 sweep and LSN
3 data in DBASE-III format on zip disks.

4 If you drop down to the fourth item, key
5 to MPAA program codes used in TV Data data, which
6 actually is consistent with what the Copyright Office
7 order said with regard to explanatory information.

8 September 18th, received call from Raul
9 saying he wouldn't be in the office to receive and
10 load the data until Wednesday, September 20th.
11 Clearly, they had access to the data before the
12 Copyright Office order.

13 As far as the meaning of the October 10th
14 order, as it relates to the October 11th telephone
15 conference, the October 10th order, the passage that
16 you read earlier, referred to -- first of all, that
17 order was addressing the issue with respect to the
18 representation agreements and because of the issue
19 that led to the October 11th telephone conference.

20 And what I explained during the telephone
21 conference was if you ask a party, "Well, what
22 document did you rely on for that particular

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1 assertion?" and they give you a book, well, that's --
2 if you speak to a specific portion of the book that's
3 irrelevant to the testimony, doesn't mean that the
4 entire book is relevant to the testimony.

5 And that's the same argument that I made
6 to Mr. Roberts on the phone the following day, and I
7 said, if I remember sort of -- this is not accurate,
8 but I said something to the effect that, "Imagine, if
9 you will, if Ms. Kessler had said 50 percent of the
10 viewers in D.C. like I Love Lucy, and the other side
11 says, "Well, what did you rely on for that testimony?"
12 and we produce a book that you see data on the viewing
13 habits of the entire United States.

14 Can you then come back and say, "Well, I
15 want to know what you rely on for saying 50 percent of
16 the people in Maryland like I Love Lucy." Well,
17 obviously, that's not discoverable.

18 What is relevant for the purposes of her
19 testimony is the portion of whatever is produced that
20 relates to the testimony. And when we get to the
21 issue of the rep agreements, we will talk about that
22 a little bit more because they admit the same issue

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1 with respect to the '97 certifications, which I argued
2 in the October 11th telephone conference that Ms.
3 Kessler did not rely on those documents. And Mr.
4 Roberts correctly said if she didn't rely on them,
5 they don't have to produce them.

6 JUDGE CAMPBELL: Mr. Lutzker?

7 MR. LUTZKER: In terms of this latest
8 reference, I think you can see quite clearly that IPG
9 had received documents from CDC in terms of these TV
10 Data logs which had not been opened. There was
11 communication back and forth during the period both
12 prior to and after the Copyright Office issuing its
13 order of September 13th, by which it compelled the
14 parties to complete this negotiation in terms of a
15 protective order, and for the parties to sort of have
16 access to these critical documents.

17 There is no question that the failure to
18 deliver these documents was not before the Copyright
19 Office at a time when these earlier orders were
20 issued.

21 As regards the oral conversation, I'd like
22 to sort of get into that in a little more detail in

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1 the next sort of focus presentation, sort of the
2 bottom line with respect to this exhibit. This
3 exhibit identifies 130 stations. We didn't make up
4 the number.

5 They put it in their brief. They are not
6 permitted, in our view, under the rules of the
7 Copyright Office's discovery procedures, to say which
8 parts of documents that they have ordered, analyzed,
9 and reviewed, in whatever form, in whatever fashion,
10 which ones we can look at to make our cross
11 examination have meaning.

12 And under the circumstances, their failing
13 to comply with the compulsion order in our view
14 compels the Panel to sort of take corrective action as
15 we've requested.

16 MR. OLANIRAN: I promise this will be my
17 last -- my final point on this.

18 JUDGE CAMPBELL: Okay. This is your final
19 point.

20 MR. OLANIRAN: Again, on those documents,
21 this goes right in line with my explanation earlier
22 where you are given a document that contains a lot of

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1 information, but only a portion of which is relevant
2 to the testimony. That is a classic example.

3 Those stations -- I believe there are PBS
4 stations in there and stations that are used for other
5 purposes. I don't think Mr. Lutzker would argue that
6 PBS is irrelevant for the purposes of this proceeding.

7 And, again, it is possible to get a
8 document from a party, only a portion of which is
9 relevant for the purposes of their testimony. It
10 doesn't mean that everything under the sun is
11 discoverable because it's in the document.

12 And for the purposes of the Motion to
13 Strike, if you have any questions that you can't
14 answer, you can save it for cross examination. It is
15 not a basis for a Motion to Strike.

16 And, finally, the remedy for documents
17 that are not produced in discovery is striking the
18 testimony related to those documents. We haven't
19 relied on them; they can't ask for the testimony to be
20 stricken because no testimony related to those missing
21 stations are in Ms. Kessler's testimony.

22 JUDGE CAMPBELL: Why don't we take about

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1 a 10-minute break, so we can convene on this point,
2 and then we can all move forward and not feel like
3 we're confusing things.

4 (Whereupon, the proceedings in the
5 foregoing matter went off the record at
6 10:38 a.m. and went back on the record at
7 10:54 a.m.)

8 JUDGE CAMPBELL: Before we move forward,
9 since there is an exhibit here, the TV stations which
10 exceed 80,000 distant subscribers -- it looks like
11 it's a CDC, Cable Data Corporation, issued document --
12 we would like for the record some clarification.

13 Mr. Lutzker, I believe you provided that
14 for us, but we want clarification from both parties,
15 so you will be able to respond.

16 First, I want -- Mr. Lutzker, for the
17 record, can you tell us anything about the captions
18 here where it says, "Distant subscribers when F1 and
19 2 systems included," and then also towards the bottom
20 there is a star, asterisk, it means "exists in TV Data
21 DTL," which might be -- mean data log, but we don't
22 know, 1997, R means exists on TVRO, and we're not

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1 quite sure what the rest actually says. Can you
2 clarify for us what any of that means?

3 MR. LUTZKER: I would respectfully say
4 this was provided to us in discovery. This is the raw
5 document that we received.

6 JUDGE CAMPBELL: We understand that. But
7 you've received it, and you've had it, and we're
8 asking, do you understand what any of that means?

9 MR. LUTZKER: I can't say that I'm sure.
10 I mean, this would be subject to cross examination, in
11 other words.

12 JUDGE CAMPBELL: But what I'm saying is,
13 at this point, at this moment, without cross
14 examining --

15 MR. LUTZKER: My guess is --

16 JUDGE CAMPBELL: -- you've had it for a
17 while, do you understand it? If you don't, we can
18 certainly -- we're going to also ask you what it
19 means. We want to make sure we get on the record what
20 everybody understands this document to mean, so that
21 we can figure out what it means.

22 MR. LUTZKER: I think we made an

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1 assumption, let me put it like that, which is not --
2 it's subject to clarification, obviously -- that items
3 that are starred are in this 82 group. Items that are
4 not starred -- no, I'm sorry. Is it okay -- I mean,
5 Mr. Galaz has studied this. He may have --

6 JUDGE CAMPBELL: Certainly.

7 MR. GALAZ: Okay. I simply want to --

8 JUDGE CAMPBELL: You're the lawyer.

9 MR. GALAZ: I'm the lawyer. Thank you.
10 Okay. The assumption that I certainly went on here
11 was that of the starred items, and it appears to be
12 handwritten on the first page, and on the subsequent
13 pages it actually seems to be part of the spreadsheet,
14 that all of the starred items are within the TV Data
15 -- in the CDC database, meaning that each of those
16 stations were stations that were ordered from TV Data.
17 I don't know that for fact, but that's what I would
18 have presumed.

19 And just for purposes of clarification,
20 this actually had more than 130 stations, but -- all
21 of these pages. However, the starred items count up
22 to 130 or 131 stations, so that's why, looking at the

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1 reference within the direct case, and then comparing
2 it with the number of starred stations here, it
3 appears as though that's what the reference was to.

4 JUDGE CAMPBELL: Thank you. Anything else
5 you want to explain about that?

6 MR. LUTZKER: Let me just try to --

7 JUDGE CAMPBELL: Oh. If you check page 2,
8 it says on the bottom, "Star means loaded in '97 TV
9 Data data log, or DTL. R means reported in TVRO SOA."
10 That helps if you know what those references mean, and
11 I bet we'll get that information in a minute.

12 MR. OLANIRAN: We're sort of handicapped,
13 since we don't have a copy of it.

14 (Laughter.)

15 JUDGE DAVIS: Oh. You don't have one?
16 Take a look at this one and we'll make another copy.

17 MR. OLANIRAN: Thank you.

18 (Whereupon, the proceedings in the
19 foregoing matter went off the record at
20 10:59 a.m. and went back on the record at
21 11:05 a.m.)

22 JUDGE CAMPBELL: Mr. Olaniran, do you have

1 some information for us regarding this? Can you
2 explain perhaps what some of the abbreviations are?
3 Particularly, next to the call sign there are a
4 variety of categories -- TSCH -- the CH I believe
5 references channel number, but it may not; and then
6 the different column headings, what they might be.

7 If you could help us out with that and
8 with any other identification information for the
9 record it would be very, very helpful. And perhaps
10 for your other side it could be very, very helpful.

11 MR. OLANIRAN: I'm actually going to
12 probably get Ms. Kessler's help in doing that. But I
13 just wanted to reiterate again that the issue, as we
14 see it, is not, you know, whether the documents -- all
15 of the stations listed here are -- producing all of
16 the stations listed here. The issue, as we see it, is
17 whether the documents, the station logs that were
18 relied upon in Ms. Kessler's testimony have been
19 produced. Those clearly have.

20 And, again, while this contains a great
21 number of stations, many of which we didn't use in our
22 testimony, our view is that those don't relate to Ms.

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1 Kessler's testimony.

2 JUDGE CAMPBELL: I understand what you're
3 saying, but I also understand that there's a question
4 as to why, and perhaps at some point we can get to the
5 why. You had mentioned earlier PBS stations would not
6 be included, and that's part of the why. To just
7 presume that the Panel and the other side understand
8 your why makes it a little difficult for the realities
9 to show, but I do understand your argument there.

10 MR. OLANIRAN: I'm actually glad you
11 brought that point up, because one of the unique
12 aspects of the CARP proceeding is that we don't get to
13 do depositions. Because we don't get to do
14 depositions, we only get to discover underlying
15 documents, those documents don't come with
16 explanations sometimes, which means you either figure
17 them -- figure out what the documents mean on your own
18 or wait until cross examination to ask questions.

19 They had documents that we have no clue
20 what they mean. We haven't made those documents a
21 basis for our Motion to Strike. We're willing to
22 explain, to the extent we can, what the individual

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1 numbers mean. But I think a fundamental point is
2 they're not guaranteed explanations.

3 Now, the column headings -- I mean, I
4 don't think anyone would argue that an abbreviated
5 column heading, you know, what does it mean? What
6 does LEN mean? What does YR mean? Things like that.

7 JUDGE CAMPBELL: We're not asking for an
8 analysis --

9 MR. OLANIRAN: Right.

10 JUDGE CAMPBELL: -- of the numbers.

11 MR. OLANIRAN: Right.

12 JUDGE CAMPBELL: But we would -- since we
13 have this and there are column headings that are
14 abbreviated, it would be helpful to all here to know
15 what they mean, just so we can --

16 MS. KESSLER: Would you like to ask
17 questions, or would you just like for me to talk?

18 JUDGE CAMPBELL: Again, I'll ask what the
19 abbreviations mean in the column headings.

20 MS. KESSLER: Okay.

21 JUDGE CAMPBELL: That would be a good
22 start.

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1 MS. KESSLER: Okay. There are actually
2 two documents here. The first --

3 JUDGE CAMPBELL: Why don't we begin with
4 page 1 that we all have, the front page.

5 MS. KESSLER: With all due respect, can we
6 start with the next page?

7 JUDGE CAMPBELL: If you'll explain why.

8 MS. KESSLER: I sure will. Okay. There
9 are two documents here. The first document has, in
10 the upper left-hand corner, February 1, 1999, F1/2/3
11 subs. That one page is a single document.

12 If you turn the page, there is a seven-
13 page printout, unnumbered, upper left-hand corner says
14 MEK 972, and that seven-page printout is a single
15 document, and it is the most important document on
16 which we relied.

17 Going across, the first column says "Call
18 Sign," and that is the call sign that the broadcast
19 station carries in its market.

20 The next column says "Type." I'm looking
21 at the first entry, KABC. It's a network station. N
22 stands for network. If you move down the page, since

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1 we're in that column, E stands for educational.
2 Further down, I stands for independent. Nothing else
3 exciting on that column.

4 The next column "SBT," I suspect that that
5 means subtype. But regardless of what it means, what
6 it says for KABC is that it is a network station, and
7 it is an ABC affiliate.

8 "Channel" is the channel number assigned
9 to the broadcast station in its local market. The
10 city of license, Los Angeles; state, California.

11 Now, in the carriage of broadcast stations
12 by cable systems, cable systems make their payments
13 according to their gross receipts.

14 JUDGE CAMPBELL: Right. That's under the
15 copyright law. What are the categories 93-1, 93-2,
16 94-1? Are those months in '94? Are they half years?

17 MS. KESSLER: Those are half years. The
18 93-1 refers to the first half of 1993. 93-2 refers to
19 the second half of 1993. And that's the same for all
20 of the columns going across.

21 JUDGE CAMPBELL: And then, at the bottom
22 where it says "TV Data DTL," is that data log? Do

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1 you --

2 MS. KESSLER: Actually, I think DTL stands
3 for details.

4 JUDGE CAMPBELL: Details. And then,
5 what's a TVRO SOA?

6 MS. KESSLER: TVRO is a buzz word for
7 satellite carriers. You know, there are two
8 compulsory licenses, one for cable, one for satellite.
9 This is a message to me saying, "Marsha, look at this.
10 This station is carried by satellite carriers."

11 JUDGE CAMPBELL: And then, SOA?

12 MS. KESSLER: Statements of Account. And
13 statements of account are the documents that cable
14 systems file when they make their royalty payments
15 twice a year.

16 Now, as I was saying, the royalty that
17 cable systems pay is based on a number of factors, one
18 of which is their gross receipt. The cable systems
19 whose gross receipts are \$292,000 and above are what
20 we call Form 3 cable systems, because these -- they
21 pay the highest royalty, and they have to report their
22 distant signals within the structure of the statement

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1 of account form.

2 And when we make the station selection, we
3 make it based on the reported distant carriage of
4 Form 3 cable systems.

5 JUDGE CAMPBELL: That was in your direct
6 case testimony.

7 MS. KESSLER: I'm sorry?

8 JUDGE CAMPBELL: I believe that was in
9 your direct case testimony.

10 MS. KESSLER: Yes, ma'am. Exactly.

11 So what I did was I went through and
12 marked the -- I looked at 1997. Cable Data provides
13 the previous years just for interest/reference. It's
14 always helpful to see the distant carriage of a
15 broadcast station in context with its previous
16 carriage.

17 JUDGE CAMPBELL: Are these stars in the
18 final column placed by you, or did that -- the
19 asterisks, are those yours, or is that something that
20 CDC or whoever provided that's put in there?

21 MS. KESSLER: In the multi-page document
22 that was entered by Cable Data.

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1 JUDGE CAMPBELL: That's what I thought
2 from the bottom. I just wanted to clarify that.

3 MS. KESSLER: All right. Do you have any
4 questions about the seven page --

5 JUDGE COOLEY: I just have kind of a
6 general question. Did you use this document at all in
7 choosing the 82 stations that --

8 MS. KESSLER: Yes, I did.

9 JUDGE COOLEY: -- underlie your testimony?

10 MS. KESSLER: I used it exclusively.

11 By the way, one thing that you had said,
12 Judge Cooley, I had the impression that you understood
13 that I picked the stations from the available TV Data
14 data that I had in stock. I did not. I picked them
15 based on what took place in the retransmission world,
16 and hoped that I had logs for the data that I was
17 ordering. If I didn't, I would make the decision to
18 go back and retro order.

19 So the selection was not made from what I
20 had in the pantry. It was -- the selection was based
21 on the recipe. If I had to get more ingredients, I'd
22 go to the store and get more ingredients, not from

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1 what I already had.

2 JUDGE COOLEY: I understood the argument
3 to be something different than --

4 MS. KESSLER: Okay.

5 JUDGE COOLEY: -- what was made by
6 counsel.

7 MS. KESSLER: The --

8 JUDGE COOLEY: I guess maybe --

9 MS. KESSLER: I feel like I'm testifying,
10 and I don't want to do that too much.

11 JUDGE CAMPBELL: No. I think --

12 JUDGE COOLEY: But to clarify for me, the
13 48 that they are complaining about, are they on this
14 list?

15 MS. KESSLER: I don't know. I would think
16 probably yes, to the extent that I have the TV Data
17 logs at Cable Data. I assume those are the ones to
18 which they refer.

19 JUDGE COOLEY: Okay. And are those 48 --
20 are those -- does that pertain to -- are they relevant
21 to what we're doing here, the retransmission?

22 MS. KESSLER: In my judgment, no, for two

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1 reasons. Frankly, I don't know the number. But among
2 those, 48 are non-commercial stations. The allocation
3 of programming on non-commercial stations is a Phase 1
4 matter between Program Suppliers versus PBS, but they
5 are not in consideration here. So, in my judgment,
6 they would not be an issue here.

7 JUDGE CAMPBELL: Well, most assuredly,
8 because they're not part of this, you don't use them
9 in calculating --

10 MS. KESSLER: Exactly.

11 JUDGE CAMPBELL: -- whatever the formula
12 is anyway.

13 MS. KESSLER: Exactly. And, secondly,
14 when we do -- when we ask for the Nielsen study, and
15 in this particular year when I asked for the Nielsen
16 study, it was not with the objective of putting on a
17 case here at the CARP. It was for the objective of
18 making a distribution of royalties.

19 And I was going to make a point with that
20 and I lost it. Okay. Oh, the missing stations. Greg
21 hates this analogy, but it really is true. We have a
22 standing order with TV Data, which every couple of

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1 years I look at and I may drop some stations and I may
2 add some stations. But it's just a standing order,
3 and it's like packing a freezer or a pantry with
4 goods, just in case I want to make something.

5 The actual recipe, I go to the pantry and
6 get the goods, and in this case the goods were 82
7 commercial stations. I didn't -- the pantry was 130
8 stations, but the goods were 82 stations. So, and
9 those were the stations I used to distribute royalties
10 to our represented companies.

11 JUDGE CAMPBELL: Based on the criteria
12 under the copyright law, correct?

13 MS. KESSLER: That's correct. Yes, ma'am.

14 Now, let me go to the second page of that,
15 the first page of the printout. Now, I'll tell you
16 quite frankly the one thing that I don't know the
17 answer to is the extent to which any of these stations
18 are in the 82. I can certainly go back to the office
19 and check it. I just don't know the answer in the
20 room this morning.

21 Our contract with Cable Data is based on
22 the number of stations that we order. And so to the

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1 extent that I can add some more stations to the
2 sample, their contract is higher. And so they provide
3 me these data in the event I want to consider the
4 sample and increase the number of stations. So this
5 is not something that I request from them, but
6 something that they provide as --

7 JUDGE CAMPBELL: Just a little promotional
8 piece perhaps.

9 MS. KESSLER: Probably.

10 JUDGE CAMPBELL: Just in case you might
11 want to pick up some stations. Obviously, they are
12 not all large towns -- Tuscaloosa, for example,
13 Cadillac, Michigan, are not major centers of
14 enterprise compared to San Francisco and New York
15 City.

16 MS. KESSLER: I'm just trying to think.
17 There is -- that's -- never mind. That's almost
18 always true, but not 100 percent true.

19 JUDGE CAMPBELL: Did you have a question,
20 Mr. Lutzker, while we're trying to --

21 MR. LUTZKER: Yes. Actually, I had a
22 couple of questions --

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1 JUDGE CAMPBELL: -- clarify some things?

2 MR. LUTZKER: -- and perhaps some comments
3 as well.

4 JUDGE CAMPBELL: Well, I'm hoping that
5 perhaps this discussion will help both sides feel that
6 the communication on this issue --

7 MR. LUTZKER: Yes. Unfortunately --

8 JUDGE CAMPBELL: -- has been clarified.

9 MR. LUTZKER: -- it raised yet another
10 issue. Marsha -- Ms. Kessler just referenced the
11 standing order that's at TV Data. We have asked, in
12 the course of discovery, for correspondence between
13 them, which is the foundation for, obviously, station
14 selections and the development of the case that they
15 presented. We don't have it.

16 I don't know what other communications,
17 correspondence -- I mean, we've asked for documents.
18 Our analysis -- again, we did not sort of come
19 prepared to deliver this as an exhibit in this
20 proceeding. During the course of Mr. Olaniran's
21 commentary that stations with 80,000 was the basis of
22 selection of the 82 sample stations, Mr. Galaz had

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1 this sort of -- and realized that this was a list of
2 stations with asterisks.

3 There are 130 or 31 asterisked stations on
4 this list, which is an intriguing coincidence. It may
5 or may not be the exact same stations, but a logical
6 conclusion that I would sort of pose to Ms. Kessler
7 when we get to testimony if this is in the record is,
8 you know, tell me the relationship between this and
9 the 130 that you referenced in your testimony.

10 And, I mean, in addition -- I mean, it's
11 clear that this is a document that has MEK 972
12 initials up on top. That's reviewed and consulted
13 with respect to the selection of the stations, and she
14 indicated that this is sort of like a bonus list
15 that's thrown in as well.

16 So going to this issue of reliance versus
17 non-reliance, and going to where the Copyright Office
18 order of October 10 was very instructive -- I mean,
19 it's saying even if you don't specifically rely, but
20 if there is a relationship such that the documents
21 ought to be produced, based upon that -- that sort of
22 analysis, they should be produced.

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1 And here I think is a perfect example of
2 a document that is -- maybe it's the ultimate
3 selection of the 82 stations, maybe not. But,
4 clearly, the analysis with regard to these stations is
5 underway. TV Data has this material available. It is
6 sent to the agent in this case, CDC, and, I mean, this
7 document to me does reinforce the argument that we
8 were making.

9 The TV Data logs, even if they're not in
10 the case of MPAA as such, form a basis upon which an
11 analysis is made. They are available to the computer
12 gurus at CDC for these purposes. And the numbers have
13 a coincidence, or the asterisks have a coincidence
14 that would certainly be probed, and we would have a
15 right, having the background documentation, to
16 continue to probe that.

17 Failing to deliver that remains a
18 continuing problem. And as I said, the failure to
19 deliver the standing order in other documentation that
20 is the relationship -- longstanding -- I mean, I
21 accept the principle that MPAA has had a relationship
22 with TV Data and CDC for many years. And they don't

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1 have to sort of say things this year that they said
2 last year. Maybe it's a phone call that says, "You
3 know, you've got the letter. Do it again." Or,
4 "You've got our standing order. Do it again."

5 But we're entitled, in this proceeding, to
6 have access to those underlying documents which form
7 the basis of that, and that's what we argue with
8 respect to TV Data, certainly with respect to the
9 logs, and --

10 JUDGE CAMPBELL: Let me ask you a
11 question.

12 MR. LUTZKER: -- now, I mean, we've
13 learned -- I mean, they said there's no
14 correspondence, and we accept them for their word.
15 And now there's a standing order which we don't --

16 JUDGE CAMPBELL: Which may not be a piece
17 of correspondence. But I have a question to ask you.
18 You have been provided this because you provided it to
19 us, and we appreciate that. Are you asking for TV
20 Data's underlying numbers that provide these results?
21 I'm missing the boat.

22 You've asked for something. You've

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1 received it. We've heard that it was exclusively
2 used. This document was exclusively used.

3 MR. LUTZKER: This is a document they had
4 an obligation to provide us in discovery.

5 JUDGE CAMPBELL: And you --

6 MR. LUTZKER: And they got it. And we got
7 it in April.

8 JUDGE CAMPBELL: Right. Right.

9 MR. LUTZKER: Okay? The documentation
10 that's provided leads to -- we are allowed under the
11 CARP rules to look at their direct case and ask
12 questions --

13 JUDGE CAMPBELL: Right.

14 MR. LUTZKER: -- underlying documents to
15 these factual claims. We asked for the factual
16 assertions with respect to the TV Data logs. This is
17 in response -- I don't remember the specific -- it was
18 our request number 23 and 42, for which this document
19 was provided. And I don't know, off the top of my
20 head -- and I don't think I have my request forms
21 here --

22 JUDGE CAMPBELL: I'm not asking for --

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1 MR. LUTZKER: Yes, what is -- this was not
2 in response to the TV Data log. This was in response
3 to another document request.

4 JUDGE CAMPBELL: Apparently, it gave you
5 that information. I'm just trying to figure out what
6 else you feel you need that you're not receiving.

7 MR. LUTZKER: There are two things. As we
8 say in our brief, we're entitled to the full TV Data
9 logs that were ordered. They were compelled. They
10 haven't been provided. There's a factual assertion.
11 There's obviously an analysis that goes on here, an
12 interpretation and assessment, because the asterisks
13 -- they are, as I said, a coincidence, maybe more than
14 a coincidence.

15 Someone goes through this process and
16 asterisks these things, and then a selection process
17 is made. Why do you choose one and not the other?
18 We're entitled to ask that. If we don't have the
19 underlying documents with respect to the missing 48
20 logs, we are handicapped in that analysis.

21 Now, as we didn't anticipate, and -- you
22 know, additional disclosures, but we've asked for the

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1 underlying correspondence. If it's a standing order
2 that's a verbal order, they don't have to provide the
3 documents. I'm not asking for that. If the standing
4 order is a written document, then it falls within the
5 parameters of the correspondence that we've asked for
6 that were answered by the MPAA, "None is -- none
7 exists."

8 And have the right to either receive the
9 document or to have -- and maybe we'll have to probe
10 this at the hearing as to, you know, did -- you know,
11 does really nothing exist? Is that a -- maybe you
12 want to ask her now. Is it a written document? And
13 then, you know, if it is, you know, I don't quite know
14 how to sort of handle this because normally you don't
15 have, you know, testimony that --

16 JUDGE CAMPBELL: I have one more
17 question --

18 MR. LUTZKER: Sure.

19 JUDGE CAMPBELL: -- of you. It may be
20 that the order with TV Data, CDC, whatever, results in
21 this, and that they never see any underlying number
22 crunching. In that case --

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1 MR. LUTZKER: Who is "they"?

2 JUDGE CAMPBELL: I'm sorry. Your
3 opponents here, MPAA, Program Suppliers.

4 MR. LUTZKER: The Copyright Office is
5 very, very, very clear that the fact that MPAA doesn't
6 have custody and control of the documents --

7 JUDGE CAMPBELL: I understand that. But
8 I'm trying to finish my question here.

9 MR. LUTZKER: I'm sorry. I'm sorry.

10 JUDGE CAMPBELL: If they didn't rely on
11 it, and they never got it, and they never used it, why
12 do you need it? I'm just trying to figure out why
13 this is relevant to your side. I'm not saying it's
14 not. I just need that information in order to
15 evaluate this motion.

16 MR. LUTZKER: Okay. The nature of this
17 proceeding -- and this is an issue which has come up,
18 and I've been before both the CRT and -- actually,
19 this is the first CARP Phase 2 proceeding in the
20 Program Supplier category, so all my experience is
21 with -- at the CRT.

22 One of the fundamental issues that has

1 been predominant in an analysis of the MPAA viewer
2 study is: What stations did you choose? Why did you
3 choose them? Nielsen does a study based upon certain
4 hours, and the like. There are things that are
5 included. There are things that are excluded.

6 Many entities that have legitimate claims
7 to royalties are excluded from the MPAA study. The
8 exclusion and choice of stations can have a direct
9 impact upon the net result, which is how much money is
10 a particular program or series of programs entitled
11 to. If you have the material, you can do -- we have
12 the capability of doing alternative analysis in terms
13 of missing programs, analyzing -- okay, if the study
14 had 110 stations, would the impact be materially
15 different?

16 We're entitled to make that analysis based
17 upon the material that they have in their files that
18 they've worked through, and based on that we would do
19 cross examination, presumably to help you assess the
20 credibility of the study, of the witness, of the
21 analysis that they're making. The more information
22 you have, the twists and turns with respect to that

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1 information that can be provided.

2 So, therefore, missing documentation is
3 important to us, as it is important to them. They
4 were prepared. They urged that our case be thrown out
5 because we had the missing 67. Turns out they weren't
6 missing. But had they been missing, their point was
7 this material should not be used because it is
8 fundamental that the entire documentation be provided,
9 even though they knew we didn't -- we had 99 stations
10 in our sample, not 166.

11 And even though that was the case, they
12 said, "Okay. Throw them out because they didn't
13 provide the missing 66, 67."

14 And so from our point of view, more
15 documents are relevant because, as Mr. Olaniran said,
16 we don't have the opportunity of, you know,
17 depositions. We don't have the opportunity at this
18 point to probe. All we can do is take at face value
19 what they provide us. They say they don't have it,
20 and we have to accept that, unless there is some
21 reason to believe that that's not correct.

22 And that's -- the only issues that we have

1 raised with you in these motions are points that we
2 know from the record can't be the case. One hundred
3 thirty stations were ordered. Were they analyzed?
4 Were they considered? How were they considered? They
5 say they don't rely upon them. We have a right to
6 test that. We have a right to test it. We have a
7 right to say, "Did you look at it? Did CDC look at
8 it? What analysis was made?"

9 There are signals here based upon 80,000.
10 There are signals that may be based upon less than
11 80,000. We have a right to probe this. And, clearly,
12 the asterisks -- someone put asterisks next to this,
13 which implies a thought process. Some have asterisks;
14 some don't. And that may be relevant to an analysis
15 of which stations are in, which are out. They total
16 up 130, and on that basis we feel, combined with the
17 direct testimony, it's not -- it's not reasonable that
18 we be denied this under the CARP rules.

19 JUDGE CAMPBELL: Thank you.

20 MR. OLANIRAN: May I just briefly? I
21 promise I will be very brief. What they are asking
22 for is not just 48. TV Data has 1,000 plus TV

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1 stations that we haven't asked for, we haven't used in
2 this testimony. If they want it, they can buy all of
3 them. What Ms. Kessler relied on for her testimony we
4 have already provided.

5 Now, I was explaining earlier about the
6 sort of unique nature of these proceedings, and the
7 fact that there are no depositions. What you've just
8 heard Mr. Lutzker say is that he doesn't understand
9 how we could not have used it. Well, that's fine. He
10 can ask that on cross examination. But it's not a
11 basis for a Motion to Strike.

12 He can ask Ms. Kessler whatever questions
13 he wants to ask her. Well, why didn't you use the
14 other 48? Why didn't you use the -- you know, 1,000
15 minus 82? I mean, or why did you use the 82? And so
16 on and so forth. He has a broad range of questions to
17 ask her.

18 But for the purposes of a Motion to
19 Strike, if they ask us, what did you rely on, and we
20 give it to them, that motion cannot survive.

21 JUDGE COOLEY: I want to clarify once
22 more. Do you know what the 48 stations are that were

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1 not used? Do you know which ones they were?

2 MR. OLANIRAN: On a --

3 JUDGE COOLEY: Or does Ms. Kessler know?

4 The question is, you know, I don't know how we're
5 going to rule. But if we rule some way, it may -- we
6 may determine that they won. I'm trying to figure
7 out, is there any information? If there isn't, what
8 are we talking about here?

9 MR. OLANIRAN: Your Honor, that is
10 precisely the problem. Ms. Kessler says in her
11 testimony 130 stations. And they have 80 -- actually,
12 they have 102, because they have data on 102.

13 So, you know, 130 minus 82 is the 48. So
14 I don't know the specific stations that they -- they
15 haven't identified it to us. And, certainly, they
16 didn't raise that issue specifically in discovery.
17 And so I don't know specifically the stations that
18 they're talking about, but I think Ms. Kessler
19 indicated earlier that, I mean, the 48 stations are
20 available.

21 But, again, and this is going to be
22 important as we go on and address the other issues,

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1 which strangely I thought the first issue was the
2 least controversial.

3 (Laughter.)

4 What's important, you can disagree with
5 what we've provided as -- that we relied upon. You
6 can say you don't understand it. You can require
7 explanation. But for the purposes of a Motion to
8 Strike, the question, the relevant inquiry is, did you
9 ask for a document that you've been provided? If you
10 don't like the document, that's fine. If you don't
11 understand, that is fair game for cross examination.
12 But it's not a basis for a Motion to Strike.

13 JUDGE COOLEY: Madam Chair, may we move on
14 to the easier issues?

15 (Laughter.)

16 JUDGE CAMPBELL: Thank you both very much.
17 I do think that we now have a record that clarifies
18 what some of the questions are, the reasons for those
19 questions, and we appreciate that. And at some point,
20 will you make sure that Mr. Olaniran gets an extra
21 copy of that from today?

22 MR. LUTZKER: Sure.

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1 MR. TUCCI: Before we go on, I hate to be
2 two hours after the process making this offer, but
3 these are inconsequential things, these TV Data logs.
4 If they will accept the group of 48 that are
5 commercial stations, we'll give them to them. I mean,
6 if they're -- they can buy them. They're available on
7 the market. I mean --

8 MR. LUTZKER: Let me just try to clarify
9 our frustration.

10 MR. TUCCI: If that offer isn't going to
11 work, I think that we ought to move on to the next --

12 MR. LUTZKER: I just want to, then, say it
13 was a generous offer. And had it been made three or
14 four months ago, it would have been perfect.

15 MR. TUCCI: That's fine.

16 MR. LUTZKER: This is, you know, like
17 three weeks before the hearing, Christmas. I mean,
18 the ability to sort of deal with this documentation,
19 which is a massive amount of material, there is a
20 frustration that we've experienced that these were
21 ordered to be compelled in June, and sort of we -- our
22 preference is that you rule consistent with, you know,

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1 the way the Copyright Office typically directs, you
2 know, failure to deliver documents.

3 I mean, I -- that would be my sort of
4 position at this point. And I think it will -- if I
5 can move on to the --

6 MR. TUCCI: We were trying to be helpful,
7 but that's fine.

8 MR. LUTZKER: In terms of -- a similar
9 concept sort of arises potentially, you know, with
10 each of these sets of documents. Can we now receive
11 a set of documentation? And our position is, we've
12 been at this. We filed our direct case in April of
13 this year. There's an accelerated charged procedure
14 by which discovery requests are made, followup
15 requests are made, motions are filed, orders are
16 issued, compliance with orders are made. Failure to
17 comply with orders result in motions, followup
18 motions. And we're now at the -- past the eleventh
19 hour in that process with the hearing just a few weeks
20 away, and we obviously are facing this during the
21 holiday season.

22 The issue with respect to the certified

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1 statements of title, which is the next broad category,
2 for us goes to sort of several components of the
3 fundamental direct case presented by the MPAA in this
4 proceeding.

5 Inherent in the testimony of Ms. Kessler
6 are several things. One, that parties that they
7 represent -- again, we're not a claimant. They
8 represent claimants. Claimants that they represent
9 sign representation agreements, which are produced by
10 MPAA, proffered to the claimant, and the parties that
11 participate actively and successfully in this
12 proceeding must satisfy the obligations of those
13 representation agreements.

14 One essential component of the
15 representation agreement is that these parties certify
16 to the MPAA the particular titles that they claim.
17 And as I understand the process -- and this may be --
18 this, again, is my understanding based upon the
19 material that's been provided to date. A list is
20 generated by CDC of titles of series and specials and
21 -- or movies that are claimed by particular claimants.

22 It's sent out, either along with a

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1 representation agreement or soon thereafter, to the
2 claimants. Claimants then go through the list, and
3 they annotate it by striking out a title and saying,
4 "This is not ours," or they add a title and say, "You
5 forgot this." And the end process is then returned to
6 the MPAA.

7 And each year when the MPAA makes its
8 presentation -- and, again, it's unusual. This is the
9 first Phase 2 CARP proceeding we've had in this area.
10 But essentially what the MPAA is saying to the Panel
11 is, "We are not a claimant. We represent claimants."

12 We have been longstanding engaging in a
13 process that will assure the agency, will assure the
14 Copyright Office, will assure the CARP, that we, in
15 fact, have the claims and the programs that we purport
16 to represent properly represented.

17 They claim they have executed agreements,
18 and when you have an executed agreement and there are
19 attachments to the agreement there is a reasonable
20 presumption that the attachments are part of -- part
21 and parcel of and delivered with respect to that
22 agreement.

1 Under any circumstances, to the extent the
2 certified statements of title exist for 1997 programs,
3 they are clearly, in its unadulterated form, one of
4 the most important pieces of evidence that you, as a
5 Panel, can consider with respect to the claims of
6 particular parties.

7 We have asked for them in a multiplicity
8 of forms. We've asked for them as part of -- part and
9 parcel of their statement that they represent
10 claimants in their Exhibit 1 to their case. Exhibit 1
11 lists 113 claimants. They modify this by dropping
12 Goumont. But with respect to the parties, they claim
13 they have executed agreements, and the certified
14 statements of account are part and parcel of that
15 certified -- part of those representation agreements.

16 We asked for it in connection with the
17 preparation of Exhibit 3, because when we saw
18 Exhibit 3 we made a certain assumption that there is
19 a relationship between a listing of 3,500 titles of
20 series and programs and information you glean from
21 claimants. It's a reasonable assumption.

22 They say, "You're wrong. We don't rely

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1 upon those documents. We rely upon the claims that
2 are filed in the Copyright Office." That's what they
3 said in their answers to discovery. Nothing else.
4 Just those claims. We find it hard believe, because
5 if you look at the claims there are like 110 or 13
6 programs identified. Be that as it may, that's their
7 answer in discovery.

8 We also asked for it in several other
9 contexts with specific questions, communications, and
10 correspondence with claimants, things sent to
11 claimants from MPAA, CDC, and things sent back from
12 claimants; correspondence with claimants. The
13 Copyright Office has said we are entitled -- in their
14 June 28th order it said we are entitled to the
15 correspondence, as well as the representation
16 agreements.

17 This, to us, is correspondence. I don't
18 know how otherwise to characterize it. If it is not
19 part and parcel of the agreement, it is correspondence
20 attendant to the agreement.

21 Now, from our point of view, the Copyright
22 Office could not have been clearer that we're entitled

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1 to this. Ultimately, in their October 10th ruling,
2 they said, "Deliver these documents. Deliver these
3 documents to IPG." The reason it took until
4 October 10th to deliver it, we asked for this in
5 April. From April until October -- well, we haven't
6 gotten these particular documents. We asked for these
7 documents in April.

8 What happened was during that process of
9 time, we asked for the representation agreements and
10 the associated correspondence, communications, and
11 attachments. We didn't get any of those because it
12 was deemed to be too confidential for us to see these
13 documents, even though we had provided comparable
14 documents very early on in the proceeding to MPAA.

15 They provided us the form in blank. They
16 provided us the certified statements of titles in
17 blank, cover sheet with no attachments, saying, "This
18 is what people signed, but we're not going to give you
19 the signed documentation."

20 As a result of that, we went through an
21 elaborate process. There were claims of
22 confidentiality. There were claims of -- different

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1 sorts of claims asserted. And ultimately we reached
2 agreement on confidentiality. We signed a general
3 protective order. You've made a ruling in terms of
4 access with respect to their attempt to treat
5 documents as so highly confidential that Mr. Galaz
6 couldn't see it.

7 And now we've got documents that are
8 essentially deemed confidential for purposes of these
9 proceedings, but it took literally until October to
10 get that resolved.

11 Now we're at a point where the Copyright
12 Office, on October 10, says, "Deliver these
13 documents."

14 JUDGE COOLEY: On that issue --

15 MR. LUTZKER: Yes.

16 JUDGE COOLEY: -- did they -- I haven't
17 reread that order. But does it specifically refer to
18 the representation agreements and the certified
19 statements of title? And I believe it gave a date of
20 October 13th --

21 MR. LUTZKER: Yes.

22 JUDGE COOLEY: -- according to your memo.

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1 MR. LUTZKER: Yes.

2 JUDGE COOLEY: And what happened on
3 October 13th?

4 MR. LUTZKER: Okay. That's -- the answer
5 I know is yes, but let me just sort of -- it
6 references on page 5 of the agreement the 1997
7 representation agreements and followup request
8 number 4 seeking program certification forms
9 referenced in the 1997 representation agreements. So
10 they were specifically ordered by the Copyright Office
11 to be delivered.

12 This resulted in this telephone call the
13 following day. And aside from the sort of
14 extraordinary procedure that that engendered -- if you
15 want to take a second to look at that. So that's the
16 last written word by the Copyright Office.

17 We then come into this issue about
18 reliance, because throughout the proceeding, as we
19 interpret it -- and it has to be discerned from some
20 of the subtle answers that are received to various
21 requests for interrogatories -- for document
22 production -- our basic understanding is that Exhibit

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1 3, which is a listing of 3,500 titles, we now know was
2 not -- Ms. Kessler did not rely upon 1997
3 certification forms to produce that list.

4 They've said it. They've repeated it. We
5 believe them. She didn't look at these forms. She
6 may or may not have had those forms at that particular
7 time. We don't know. But I have no doubt -- and I
8 take her at her word she didn't look at it, and they
9 can't introduce those forms to support that list.

10 And that's what the failure to deliver
11 those documents with respect to that means. It's not
12 a document they relied upon, so they can't support it.

13 Okay. There's a separate issue of whether
14 we're entitled to the documents. We've asked for
15 these documents in several different ways. The
16 reliance in connection with Exhibit 3, which was our
17 initial assumption -- here's a list of 3,500 programs
18 coming out of claimants.

19 If you look at the direct case it's
20 titled, you know, "1997 Represented Claimants
21 Programs." I mean, these are clearly programs one
22 would make a reasonable assumption are the 1997

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1 programs that their 113 claimants own in some fashion
2 in this proceeding. That's what I would expect them
3 to say.

4 How they come up with that list is the
5 issue. The representation -- the certified statements
6 of title are critical because they acknowledge, both
7 as we heard yesterday -- there are situations in which
8 program ownership changes hands. There are agreements
9 to -- people don't -- the 113 claimants don't own
10 every program. They may own a fraction, and they may
11 be distributors of another fraction. Those
12 distribution deals change over periods of time.

13 Who represents what when, according to the
14 Copyright Office, is a critical issue in this case.
15 So with respect to those programs, we feel this
16 document is obviously great evidence for them. Why
17 wouldn't it be? It tells what people are claiming.
18 Nevertheless, they haven't relied upon it in producing
19 that list. That's okay.

20 But we're entitled to documents aside from
21 that fact. I'll concede -- I'll accept the fact. In
22 fact, I won't allow them to suggest that they relied

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1 upon it, and you shouldn't either, for the production
2 of Exhibit 3. But they do rely upon it in other
3 fashions and other forms in this proceeding.

4 That issue, respectfully -- and we may
5 have disagreement on this point, and this is the
6 problem with oral conversation. I don't feel that
7 issue was posed to the Copyright Office. I don't feel
8 the issue was posed, is this attendant correspondence
9 that was ordered compelled on June 28th by the
10 Copyright Office?

11 Is this attendant correspondence between
12 the claimants and the MPAA? Is this documentation
13 that goes from CDC to the claimants, goes back from
14 the claimants to either CDC or the MPAA, is
15 incorporated in the database? We were entitled to
16 receive this material from the get-go. This is a
17 critical document in the proceeding. It has not been
18 provided.

19 It has not been provided because of the
20 rationale which, true as it may be with respect to
21 Exhibit 3, has no bearing with respect to the
22 remainder of the requests that we've made.

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1 To suggest, as is done -- and this is
2 where I will strenuously disagree -- to suggest, as
3 was done in the reply brief, or the opposition brief
4 in this portion of the motion -- that because it's
5 referenced in a contract does not make it discoverable
6 to me is an unfortunate concept. I don't -- it's as
7 if -- it's not simply referenced. It is a vital,
8 critical component of this contract.

9 If you don't deliver these certified
10 statements of title guaranteeing to us, you can't get
11 a penny, Mr. Claimant. You're a lawful claimant
12 according to the Copyright Office. We're holding the
13 money that represents your share, but you're not
14 entitled to a penny unless you provide us this
15 document.

16 They come before the Panel and present an
17 entire modus operandi of how they do business, which
18 is diligent and determined to be scrupulous in terms
19 of the care of these funds. And one essential part of
20 those funds -- of that modus operandi are these
21 certification reports.

22 You make your decision, I would contend,

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1 in no small measure -- in no small measure -- based
2 upon the representations they make that they've got
3 this process down pat, that they've explained it in
4 the past, they've got it down pat, and these claimants
5 certify -- as one of the essential processes, they
6 certify that they own these programs. So you won't be
7 giving money to somebody who doesn't deserve it.

8 And if we're not entitled to have access
9 to those documents in the 1997 proceeding, then we
10 have been greatly disserved by the discovery process.
11 We have been provided documents for 1996. All good
12 and well, that may or may not have relevance to this
13 proceeding. There may be some overlap, but I will
14 just add parenthetically -- and I don't remember the
15 number exactly in my head -- but the number is far
16 less, far less, than the 113 claimants in this
17 proceeding.

18 Fifty, 60, 70 perhaps 1996 forms were sent
19 under the protective order, but we didn't get 113. We
20 couldn't have gotten 113 because there were -- as we
21 said yesterday, there were several dozen, as many as
22 35 or 36 claimants, who didn't even file a claim in

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1 1996 who are participating in 1997.

2 We're now being forced to go through cross
3 examination with respect to the -- probably the most
4 critical component in this case -- what programs do
5 you represent? You know, you're seeking claims for
6 retransmission of copyrighted television programs,
7 what programs you represent? And we're not entitled
8 to have the lists that are produced, that are shared
9 between CDC, MPAA, and claimants, and we're told that
10 it's merely reference, it's not relied upon.

11 I just -- I just -- I'm -- I just find
12 that that is -- is insulting to the discovery process,
13 and the remedy that we seek is set out in our case.
14 The remedy is you had plenty of opportunity. We're
15 not playing games here. We've got a claimant who has
16 a lawful, legitimate basis to go forward, and we're in
17 opposition.

18 We couldn't settle. Fine. So we're in
19 opposition. We're entitled, under these limited
20 rules, to have this access to this material. And from
21 our point of view, it is clear and convincing, the
22 effort to rely upon this oral telephone conversation

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1 at the tail end of the process -- one of the things
2 that stuck in my mind that Mr. Roberts did communicate
3 is, well, I mean, I hear what you're telling me, but
4 it's -- essentially, it's up to you.

5 You take whatever risks are associated.
6 If you don't want to deliver it, you didn't rely upon
7 it, you say you didn't rely upon it, you know, that's
8 fine. I mean, they have a right not to give it to us
9 under the CARP rules. We have -- there is no
10 compulsion orders from the agency to compel them to
11 deliver documents to us.

12 The only remedy that we can seek is to
13 strike relevant portions of the testimony, and that's
14 what we've done.

15 JUDGE CAMPBELL: Question for you, please.
16 Mr. Lutzker, the documents you're talking about are
17 the 1997 cable representation agreements and the
18 underlying documents and the certification of titles,
19 is that correct?

20 MR. LUTZKER: The --

21 JUDGE CAMPBELL: Because the cable
22 representation agreements have been provided.

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1 MR. LUTZKER: Yes. We're not talking --
2 the representation agreements have been provided. The
3 representation agreements incorporate --

4 JUDGE CAMPBELL: I just wanted to make
5 sure we got in --

6 MR. LUTZKER: -- the certification -- the
7 certified statements of title. And that we haven't
8 been provided.

9 JUDGE CAMPBELL: That clarifies that. I
10 think you were provided after you wrote your material
11 for the CARP to review.

12 Mr. Lutzker, are you finished for a
13 moment?

14 MR. LUTZKER: For the moment, sure.

15 JUDGE CAMPBELL: Mr. Olaniran?

16 MR. OLANIRAN: Thank you, Your Honor.

17 I think it's important, again, to sort of
18 set out what the rule is. The rule is if the witness
19 relies on a document, we have to produce it. If the
20 witness does not rely on a document, we don't have to
21 produce it.

22 The October 10 order said initially that

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1 we had to produce the '97 certifications, which
2 created a problem for Program Suppliers because we
3 said all along that we never relied on the '97
4 certifications.

5 So I called the Copyright Office -- their
6 communications with the CARP, and they were doing
7 things on somewhat -- and my statement to Mr. Roberts
8 was that I didn't want to address the issue without
9 having Mr. Lutzker present.

10 So we did a telephone conference, and I
11 addressed this specific issue, which was we did not
12 rely on the '97 certification statements. And he
13 said, "Well, to the extent that you didn't rely on
14 them, you don't have to produce them." And in your
15 response to my October 13 demand state so in your
16 letter.

17 And in Exhibit 5, I believe, of their
18 motion they attach that letter. And I think on page 2
19 of that letter, under C, the last sentence says,
20 "Based upon the Copyright Office's ruling, after the
21 parties' oral arguments we had a telephone conference
22 on October 11th. Program Suppliers are not required

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1 to provide such documents."

2 So we are essentially going over the same
3 issue again. We have already talked about this. It
4 doesn't matter how many different ways they try to
5 recast this issue. The Copyright Office already
6 looked at it, and they said we don't have to produce
7 it.

8 JUDGE COOLEY: All right. I just have a
9 question about oral rulings. We haven't addressed
10 those yet. In any of the other proceedings I've been
11 in we've never had one. What binding force do they
12 have?

13 MR. OLANIRAN: I think to the extent that
14 the Copyright Office issued an order and said, "Put
15 the order in writing" -- and Mr. Lutzker does not
16 dispute that that's what the ruling was. I don't
17 think there's any dispute about that.

18 So I think the parties can agree that that
19 was what was ruled upon. And if the Copyright Office
20 -- we assumed that they were not in error when they
21 asked us to put that in writing.

22 JUDGE COOLEY: Well, then, I guess I have

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1 a basic question, then. If both sides do agree that
2 there was an oral ruling, and you could stipulate to
3 what the oral ruling was, then why do we have the
4 issue before us?

5 MR. OLANIRAN: Well, that's a very good
6 question. I don't think -- Mr. Lutzker has said that
7 the Copyright Office did not change its mind. I think
8 he has actually conceded that.

9 JUDGE COOLEY: Well, then, he'll answer my
10 question when we get back to his reply.

11 MR. OLANIRAN: I think he said that he
12 concedes that that's what the Copyright Office said.
13 And even leaving that aside, going to the substance of
14 their question, they are saying because there's a
15 statement in the rep agreement for '97 that says that
16 the -- I'm sorry, the statement -- the claimants
17 produced statement of title, in paragraph 3, "The
18 complete certified statement of titles shall be
19 produced."

20 And Ms. Kessler's testimony that says that
21 the claims were certified, that means that she relied
22 on the '97 certifications and the statements of title.

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1 JUDGE COOLEY: '96.

2 MR. OLANIRAN: '97.

3 JUDGE COOLEY: '97.

4 MR. OLANIRAN: Here's what they are
5 saying. That because within the '97 certifications,
6 there's a statement in there that says there will be
7 a statement -- a written statement of title. And
8 also, Ms. Kessler -- in addition to that, Ms.
9 Kessler's testimony says there will be some sort of
10 certification. That means that for the purpose of Ms.
11 Kessler's testimony she had to have relied on those
12 documents.

13 Well, that's not true. The certification
14 process, the verification of titles process, is
15 exactly what it is -- a process. There is no
16 testimony that that process occurs simultaneously with
17 the execution of a representation agreement. It
18 involves --

19 JUDGE CAMPBELL: Well, actually -- excuse
20 me. Actually, I think we discussed this the other day
21 -- yesterday -- when you said the representation
22 agreements were signed, and then later on, because

1 some have a long list of titles and others do not have
2 a long list of titles, you get that information
3 thereafter.

4 MR. OLANIRAN: Exactly. And it's the same
5 thing that's -- it's an ongoing process. Ms. Kessler
6 has not said in her testimony that she relied on the
7 documents.

8 Now, it's a very fair question to ask,
9 "Well, if you didn't rely on the certification or the
10 statement of titles from the claimants, well, how did
11 you determine the number -- the 3,500 titles that you
12 claim in this testimony?" That's a very good
13 question.

14 And we have said, "Well, we have relied in
15 part on the '96 certifications." Well, the question
16 then becomes, well, how did you use the '96
17 certifications to determine '97 titles? Well, that's
18 fine. It's a question, again, for cross examination.

19 There is a methodology that we use, and
20 they are fully capable of exploring that methodology.
21 For the purposes of a Motion to Strike, the question
22 is: have we produced what we relied on for the

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1 testimony? We have. We're not required to produce
2 anything else.

3 JUDGE COOLEY: This goes -- this is a
4 little broader than the issue that we're dealing with
5 here. But aren't you taking some kind of a risk, and
6 you know what that is if there is one, that we might
7 find that your evidence relying on '96 information is
8 inadequate. Aren't you taking a risk in going
9 forward?

10 MR. OLANIRAN: I think you're right. I'm
11 addressing the issue with respect to what is the
12 standard for determining a Motion to Strike.

13 The proceeding has two phases. There are
14 issues that come up in Phase 1. If we feel they
15 haven't sufficiently been addressed, or if they have
16 been addressed incorrectly, or whatever, we certainly
17 may present testimony in the rebuttal to deal with
18 those.

19 And we also have an opportunity during the
20 course of this proceeding, to the extent that we need
21 to amend our testimony --

22 JUDGE COOLEY: No, no. Let me just ask

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1 this. Are you saying that at this point in the
2 proceeding you don't see the '97 information relevant?
3 But sometime -- and maybe in rebuttal -- it may become
4 relevant because of the cross examination? When we're
5 dealing with the '97 year for royalty distribution?

6 MR. OLANIRAN: Well, that's not exactly
7 what I'm saying. I'm saying that there is a question
8 about how we derived Exhibit 3. And the answer to
9 that is one of the ways -- one of the documents that
10 we relied upon was the '96 certification. It is a
11 very fair question to ask, "Well, how did you get --
12 how do you claim '97 titles without a '96
13 certification?"

14 Well, if we are filing testimony today,
15 and we haven't undergone the process of determining
16 the titles, certainly we have to have a methodology
17 for claiming the titles. Our testimony does not say
18 specifically, "Claimant ABC is entitled to one, two,
19 three, four titles." Our testimony is a combination
20 of different titles, different program categories, and
21 then we'll list individual titles.

22 They are entitled to ask us how we did

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1 that. And if the process completes itself before Ms.
2 Kessler gets on the stand, or shortly thereafter, or
3 whatever, and we feel the need to amend the testimony
4 to the extent that we have, you know, more accurate
5 data or whatever, then we have the choice of producing
6 that.

7 But if you ask us the question, how did we
8 determine 3,500 titles, and we've given the documents
9 that we used, and we say, "Well, you'd have to ask Ms.
10 Kessler how this came to be," that is a very fair
11 question. But, again, for the purposes of a Motion to
12 Strike, the relevant issue is, have you produced the
13 underlying documents? We have.

14 And, certainly, I -- I don't discount the
15 concern that there is -- you know, you could claim '97
16 titles but somehow not produce '97 documents.
17 Intuitively, that triggers an inquiry. But that's
18 true, and it should. But, again, the inquiry is not
19 relevant today. It's relevant for cross examination.

20 And, again, if she didn't have the
21 verification of titles when she is writing her
22 testimony, she could not have possibly relied on them.

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1 JUDGE COOLEY: Well, is that your
2 argument, that she did not have them?

3 MR. OLANIRAN: That is -- those documents
4 did not exist in the form that they asked them for at
5 the time she wrote this letter. And, again, the rule
6 is not that the documents have to exist. The rule is
7 she has to rely on the documents.

8 So if -- you know, we can disagree as to
9 whether or not she should have. You can look at it
10 and say there's no way she could have come up with
11 those titles without looking at '97. That's fine.
12 It's just a disagreement. It requires an explanation.
13 And they can disagree; they can ask several questions
14 about it.

15 But the point is, for the purposes of a
16 Motion to Strike, if she didn't rely on the documents
17 they cannot ask for anything to be stricken.

18 JUDGE CAMPBELL: Mr. Olaniran?

19 MR. OLANIRAN: Yes.

20 JUDGE CAMPBELL: May I interrupt?

21 MR. OLANIRAN: Sure.

22 JUDGE CAMPBELL: Correct me if I have this

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1 wrong -- I think what you are trying to let all of us
2 know is that today we're here in response to a Motion
3 to Strike Testimony and Preclude Introduction of
4 Evidence, and you are trying to respond to that issue
5 only, not additional issues that are not brought in by
6 this Motion to Strike, issues that might be brought in
7 at another time, during oral argument, or during a
8 response to another filing, or any number of reasons.

9 But today you're trying to say -- and
10 correct me if I'm wrong -- that we have a Motion to
11 Strike, the issue was regarding what Ms. Kessler
12 relied upon for -- in response to a certain matter.
13 She relied upon A, B, C, not X, Y, Z. And, therefore,
14 you're responding to A, B, C; X, Y, Z is another day,
15 another story, another question. Is that essentially
16 what you're saying is that you're trying to focus on
17 today's issue and not draw in broader issues?

18 MR. OLANIRAN: Well, I'm focusing on
19 today's issues specifically, but I'm trying to address
20 the Panel's concern about what may or may not be an
21 issue down the line, which has -- I understand the
22 sort of intuitive inquiry that is triggered by saying

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1 we used this set of documents to develop a particular
2 exhibit when it doesn't appear just on the face of the
3 documents that they are related. I mean, I understand
4 that.

5 But, again, we're not precluded from
6 providing additional testimony, to the extent that we
7 need to be -- we need to provide such documents. What
8 I'm trying to address is that there are a lot of
9 explanations that have to be given by -- for a lot of
10 the testimony. We haven't even talked about their
11 testimony, and we certainly have a lot of questions
12 about their testimony.

13 I mean, they have a distribution
14 methodology that I can tell you right now we don't
15 understand. But we have not made that a basis for a
16 Motion to Strike. We understand that because they're
17 not obligated to provide an explanation -- and I
18 believe they've said in several of their pleadings
19 that we just don't understand what's in front of us.
20 Well, that's fine.

21 JUDGE COOLEY: Well, let's just get -- you
22 know, let's cut through all of this legalistic stuff,

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1 really. Do you intend to present in this proceeding,
2 at this time, do you intend at this time to produce
3 any evidence, or introduce any evidence, regarding '96
4 information?

5 MR. OLANIRAN: Your Honor, we may. If the
6 process is complete in sufficient enough time, and
7 there is enough of a variation in the data that's
8 produced through the process, we may feel the need to
9 produce additional evidence.

10 And, again, the process is not complete
11 right now, and that's -- I mean, I know that they have
12 characterized the issue.

13 JUDGE COOLEY: Well, I guess the question
14 that I have is, do you -- are you going to move to
15 amend your direct testimony? You can do that.

16 MR. OLANIRAN: It is possible, Your Honor.
17 It is possible. And the process is -- this is the
18 first time, by the way, that we've ever had to produce
19 anything beyond blank representation agreements. I
20 mean, this is the first time in the history of the
21 proceeding, as far as I know.

22 I mean, and so, I mean, this is kind of

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1 new territory. We've never had to do this. It's
2 never really been an issue. So because everyone knows
3 that on that day, with 3,500 titles and 112, 113
4 claimants, it's near to impossible to have all of that
5 done.

6 So if we're looking strictly at what the
7 rule says, we have abided by the rule. And the
8 question is: if we complete at the -- you know, if --
9 you know, if we complete the process sufficiently in
10 advance to present additional testimony if, in fact,
11 additional testimony would develop over the material,
12 that -- we're not precluded from doing that.

13 JUDGE COOLEY: Let me ask you this. If we
14 grant their Motion to Strike, assume that we would
15 come down on that side, does that mean that then you
16 could move to amend later in the proceeding and
17 introduce testimony that regarding the '97 information
18 -- and then you would be allowed to bring it in?

19 I'm just trying to figure out the scope of
20 what you're arguing, because I -- I hope we're not
21 wasting our time here arguing about a legalistic
22 matter that really should be dealt with by you folks

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1 sitting down and figuring out how you're going to
2 present your cases.

3 This may be able to be done in a
4 negotiated kind of situation, in a pre-trial, pre-
5 hearing negotiation. I just don't want to spend a lot
6 of time on this if, you know, a week from now you're
7 going to move to amend your direct testimony.

8 JUDGE CAMPBELL: And I agree. It might be
9 very valuable for both parties to just -- at least the
10 lawyers talk about what you intend to do the week of
11 January 8th, so that if there are questions, rather
12 than saying, "Well, we didn't have that information,
13 didn't know you were going to ask," people could be
14 very well informed, very well prepared, know what
15 questions to ask, know what response mechanisms are
16 required, and that could definitely make the hearings
17 the week of January 8th far more valuable to everybody
18 involved.

19 Again, it gives us a more fair process,
20 and it gives everyone an opportunity to be heard
21 rather than coming up with questions no one realizes
22 for which they need to be prepared.

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1 MR. LUTZKER: May I have just a couple of
2 minutes to confer with --

3 JUDGE CAMPBELL: Absolutely. In fact --

4 MR. TUCCI: I've got another offer.

5 (Laughter.)

6 JUDGE CAMPBELL: Do you want to take a
7 break, in case you want to confer with --

8 MR. LUTZKER: I think I can be relatively
9 brief in responding to sort of the major points so
10 that as we -- as we leave right now --

11 JUDGE CAMPBELL: And then take a little
12 break.

13 MR. LUTZKER: Yes, and then take a break.

14 JUDGE CAMPBELL: Okay. Is that
15 appropriate for the moment?

16 MR. LUTZKER: Okay. Point number one --

17 JUDGE CAMPBELL: And then you can respond
18 again --

19 MR. TUCCI: Do you want to hear the offer
20 first, or --

21 (Laughter.)

22 JUDGE CAMPBELL: Why don't we let him

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1 speak, and then you can converge into discussions off
2 the record.

3 MR. LUTZKER: Point number one, Mr.
4 Olaniran has repeated something that's not correct.
5 The Copyright Office has stated, even if you don't
6 rely on a document, it may have to be produced. We
7 feel these are documents that have to be produced,
8 number one.

9 Number two, he is saying -- and we agree
10 -- we accept the conclusion they did not rely upon
11 these 1997 certified statements of title to produce
12 their Exhibit 3. That was the thrust of the phone
13 conversation. That is all I would concede with
14 respect to it, because I can't challenge the factual
15 representation. They didn't rely upon it. They don't
16 want to produce it for that purpose.

17 I will resist any suggestion -- and, in
18 fact, I will cite to a -- I think it's -- which
19 circuit is this? It's the 10th Circuit Court of
20 Appeals for the proposition that the District Court's
21 oral -- and this is the case we cite in our brief, and
22 I'll provide it for the record, too -- in the City of

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1 Albuquerque --

2 JUDGE CAMPBELL: And would you also
3 provide the Panel with a copy of that case?

4 MR. LUTZKER: I said -- yes, I would.
5 I'll just reference it now, and this afternoon I'll
6 get you copies.

7 The District Court's oral ruling in this
8 case -- and I sort of won't go back, but there was an
9 oral ruling -- does not appear to have been committed
10 to writing in accordance with Rule 65(d). Now,
11 obviously, we're dealing with federal procedures here.

12 But the Supreme Court has explained that
13 this is not a mere technical requirement. This is
14 quoting the Supreme Court, "The rule was designed to
15 prevent uncertainty and confusion on the part of those
16 faced with injunctive orders, and to avoid the
17 possible founding of a contempt citation on a decree
18 too vague to be understood."

19 The analogy we have here is this is the --
20 the vagueness that comes from this telephone
21 conversation, unrecorded, unbriefed, focused on one
22 aspect, one highlight, putting everybody under

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1 pressure of -- I've got, you know, the Copyright
2 Office on the line, I'm going to patch you in to a
3 phone call to sort of resolve -- we don't want to
4 provide these documents in two days.

5 It's not there. I'll accept the fact that
6 they say they don't rely for Exhibit 3. I'll
7 stipulate to that. And I won't allow them, in my
8 view, to amend the case to say that they did. They
9 can't. They shouldn't be allowed to amend the case.

10 But they -- but this is a document that
11 they rely upon as part of the representation
12 agreement. It is part and parcel. It is an essential
13 part of the representation agreement. And it is
14 inaccurate, in our view, to say that they don't rely
15 upon it, because they come to the Panel, they come to
16 the Copyright Office, and they say, "We are not a
17 claimant. We represent these claimants. These
18 claimants certified to us that we should take this
19 money. So give us this money, so we can dole it out
20 to the people as we determine under our formula."

21 And the bottom line is that that
22 certification is part and parcel of the representation

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1 to you. So even if they don't rely upon it to produce
2 Exhibit 3, even if they don't rely upon it for other
3 purposes, the bottom line message that they do rely
4 upon that I think is a foundation of this case, is
5 that they have these certifications, and that gives
6 them the bona fides for you to give them the money
7 because they're not a claimant.

8 And I would add in, additionally, so that
9 you put it in context -- this issue hasn't been
10 addressed before. Of course it hasn't. This is the
11 first Phase 2 proceeding involving the Program
12 Supplier category since the CARPs have been created.

13 They haven't had to produce this in the
14 1990 to '92 proceeding. It wasn't an issue. Maybe it
15 wasn't asked for. Maybe it could have been asked for.
16 It wasn't. We weren't a party to that proceeding.
17 We're not bound by that.

18 In prior CRT proceedings, they didn't have
19 the document discovery procedures. You were literally
20 on the fly in those proceedings with documents being
21 introduced and parties being negotiated and analyzed.
22 I mean, if you thought what we did with the -- that

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1 five-page thing was unusual, that's the typical way
2 the CRT proceeded.

3 Someone would introduce a document for the
4 first time. You would see it. And you'd, on the fly,
5 make an analysis of it. The CARP developed clear
6 rules for discovery. That's one of the obligations
7 that we feel you have is to maintain these rules with
8 clarity, so that parties going forward in other
9 proceedings will know what the rules are.

10 Oral conversations with the agency, if
11 you're really concerned about it, get it in writing.
12 In terms of documents, if you say you don't rely upon
13 it one case, but it is a foundation of your case,
14 you've got to produce it.

15 And, you know, just -- the notion -- I
16 don't think I need with it at this point, the notion
17 that they could amend their case at some future point
18 to make up for any of the weaknesses, particularly
19 with respect to documents that were asked, rejected,
20 compelled, and not delivered.

21 JUDGE CAMPBELL: Mr. Lutzker, I have a
22 question. The certification of titles that you are

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1 seeking, are they not comparable to the program
2 listings that are attached to the representation
3 agreements in your client's filings?

4 MR. LUTZKER: There is -- would you say
5 they're comparable?

6 MR. GALAZ: I would say that some of --
7 first of all, some of our contracts do identify
8 specific titles that are being covered, and other
9 contracts cover any and all properties and programs
10 that are owned or distributed by the particular
11 claimant.

12 JUDGE CAMPBELL: I understand that, which
13 is --

14 MR. GALAZ: Maybe I misunderstood the
15 question.

16 JUDGE CAMPBELL: No, I understand that,
17 which is --

18 MR. GALAZ: Okay.

19 JUDGE CAMPBELL: -- where my question is
20 coming. How are the titles certified through your
21 client's filings? Since there are no certifications.
22 I have not seen --

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1 MR. LUTZKER: Well, I mean, a
2 certification -- again, and this becomes sort of a
3 critical part -- as I understand the process, CDC
4 produces a document, because I looked at the '96
5 certified statements of title. It has CDC, and it's
6 a computer-generated document -- series and specials
7 or movies. And those documents are produced from the
8 CDC database, sent to the client, and then they are
9 typically sent back with a coversheet. Okay?

10 And our client does things differently,
11 but the net effect is we've identified the programs
12 that we claim ownership of. And if there is a dispute
13 of ownership, that is one of the issues that may be
14 addressable reasonably during the course of the
15 proceeding.

16 We're not even in a position to have the
17 documents. They have our documents. I mean, all
18 we're dealing with here is discovery, documents, and
19 the implications of failing to deliver documents. The
20 veracity of the document, the credibility of the
21 document, the authenticity of the document, these can
22 be addressed sort of during the course of a hearing.

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1 We don't have documents. They have
2 documents that we produced. We don't have comparable
3 documents for them. We're, at this point, asking for
4 what we believe to be the appropriate remedy to strike
5 those portions of their case that appear, in our
6 judgment, to rely upon those documents.

7 JUDGE CAMPBELL: Mr. Olaniran?

8 MR. OLANIRAN: I just wanted to respond,
9 and I think Your Honor raised a very valid point in
10 that they don't even have certifications. They just
11 list titles. So, I mean, we're in the same boat with
12 respect to how did you get to the titles that you
13 claim. So, and that's fair game, again, for cross
14 examination.

15 I think for the purposes -- at least for
16 the purposes of the Motion to Strike, they certainly
17 have no basis, to the extent that we've told them that
18 we didn't rely on the documents. And if -- you know,
19 if Mr. Lutzker wants to defer the issue of whether or
20 not we are providing additional testimony, we would be
21 willing to.

22 But, certainly, as I've said before, if

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1 the process becomes complete in enough time for us to
2 provide additional evidence, or for us to deem the '97
3 certification as relevant to the testimony, and we
4 feel we need to amend our testimony, we certainly
5 will.

6 I mean, we've produced -- we produced what
7 was relevant at the point that we wrote our testimony,
8 what the underlying documents were. So there's no
9 question about that.

10 And I understand Judge Cooley's concern
11 that, you know, we don't intend to ambush them with
12 '97 certifications just before, you know, the hearing.
13 If the process is complete before then, and we feel
14 that we have -- you know, we will give it to them.

15 And, again, you know, the process is for
16 the purpose of distributing royalties. It's not for
17 the purpose of filing testimony. We have a
18 methodology which we feel we can fairly accurately get
19 a hang on the group -- the group of titles that we
20 think we're entitled to. I mean, there are other data
21 that's before that, including the other TV Data data
22 that we also have.

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1 I mean, so it's not that they don't have
2 any information about '97 at all. What they don't
3 have specifically are just the '97 certifications and
4 listing of the titles, which they -- I don't think
5 there's any dispute that the documents probably didn't
6 exist, or I don't think there's any argument that if
7 Ms. Kessler didn't rely on them that she should have
8 to produce them.

9 All of the data are pretty much '97 data.
10 All of the viewing is '97 viewing. And the
11 certifications and the statement of titles, which we
12 do for the purposes of distribution of royalty, the
13 process is not completed.

14 If the process was complete before the
15 hearing was initiated, we would have used those, but
16 they weren't there then, so we couldn't use them.

17 JUDGE DAVIS: Excuse me. I have one brief
18 question that anyone can answer. Is there a sample
19 certification of title form attached as an exhibit to
20 anyone's pleadings here? So we can -- my underlying
21 question is: exactly what information is supplied on
22 that, by whom?

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1 JUDGE CAMPBELL: If any -- and, on the
2 other hand, is it just that the party will send you in
3 a list, and everybody's list could be different in the
4 way that they provide it.

5 MR. OLANIRAN: Right. It should be -- I
6 think Ms. Kessler describes the process. I think it
7 may be initiated by either MPAA sending the titles to
8 the claimants, and then they return it, and then there
9 is some verification going on. And then, at the end
10 of the day, the claimants have to say, "Yes, these are
11 our titles," or "They absolutely -- these are not our
12 titles."

13 JUDGE CAMPBELL: And perhaps, could they
14 even just respond the same list for '96 is the same
15 list for '97?

16 MR. OLANIRAN: That is also very possible.
17 And, again, what you have to understand, we have --
18 MPAA has been doing this for quite a while, and we
19 have had a core group of the same players.

20 And even if you argue that the information
21 switched hands from one entity to another, by and
22 large, those claimants remained in the same group.

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1 And a good example was yesterday when Big Ticket went
2 from Big Ticket to Worldvision to Paramount. So this
3 happens all the time.

4 And as Ms. Kessler likes to say, it's just
5 a ripple in the lake. It doesn't change the amount of
6 the water. And that's exactly what it is. So it
7 doesn't make it irrelevant -- I mean, the '96
8 verifications irrelevant.

9 Again, if the process is done in enough
10 time, we have -- this is -- we don't have any reason
11 to not produce them. I mean, granted, this is the
12 first time we've had to produce --

13 JUDGE COOLEY: Let's put out a little
14 syllogism here. All right. Do you believe that '97
15 information is relevant to this -- the '97 year that
16 we're dealing with here?

17 MR. OLANIRAN: I'll be very honest. Until
18 the process is complete, and until we have a chance to
19 compare what that process produces versus what we have
20 now in evidence, I really cannot honestly answer that
21 question.

22 JUDGE CAMPBELL: You can't testify to

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1 that.

2 MR. OLANIRAN: I really cannot answer
3 that.

4 JUDGE COOLEY: Now, wait. You don't know
5 if '97 information is relevant to this proceeding, any
6 '97 information.

7 MR. OLANIRAN: Well, it is relevant to the
8 extent that if there's such a result that is -- it
9 produces a result that we think may be necessary to --
10 in the testimony, I mean, certainly we did -- we are
11 not claiming to ascertain that the 3,500 titles
12 related to every single claimant. That's not the
13 process we went about doing it.

14 But we think what we have done is a fair
15 estimation of the titles that belong to us. We have
16 not produced testimony on individual titles. We have
17 provided testimony on a group of titles, on a variety
18 of titles, on the diversity of the programming.

19 So, I mean, it's just --

20 JUDGE COOLEY: Okay.

21 JUDGE CAMPBELL: I think also what Mr.
22 Cooley was trying to point out is the matter at hand

1 is 1997.

2 MR. OLANIRAN: Right.

3 JUDGE CAMPBELL: And if MPAA is saying,
4 "Well, '97 doesn't matter; we're only relying on '96,"
5 that would not be appropriate because we are talking
6 about '97. I think what your response is, yes, we're
7 dealing with '97, but because there may be overlap,
8 '96 information might be applicable and hasn't been in
9 testimony. Is this what -- am I --

10 MR. OLANIRAN: Yes. That's --

11 JUDGE CAMPBELL: -- catching your
12 argument?

13 MR. OLANIRAN: There's already '97 data
14 that has been produced. All we can deal with is '97.
15 The TV Data data is '97.

16 JUDGE CAMPBELL: So you --

17 MR. OLANIRAN: So this -- I mean --

18 JUDGE CAMPBELL: -- a good degree of the
19 '97 hard data.

20 MR. OLANIRAN: But with respect to just
21 the narrow issue of the title is what I think we're
22 trying to address. Just the certifications,

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1 essentially.

2 JUDGE CAMPBELL: And for our edification
3 here, there is no formal certification document issued
4 by the Copyright Office that you --

5 MR. OLANIRAN: No.

6 JUDGE CAMPBELL: -- have. It's not like
7 the other --

8 MR. OLANIRAN: And there's no --

9 JUDGE CAMPBELL: -- forms. That was our
10 understanding, but I just want to make sure that is on
11 the record.

12 MR. OLANIRAN: Not only that, there is no
13 legal requirement to have a certification.

14 JUDGE CAMPBELL: Thank you.

15 Any other response?

16 MR. LUTZKER: Yes, a few things. First,
17 a misstatement regarding the IPG situation. The
18 claimants of IPG, in their agreement, represent and
19 warrant with respect to the -- their relationship to
20 their program, so there is an assurance with regard to
21 their relationship to the programs.

22 Second point, the discovery rules of the

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1 CARP do not allow a claimant-represented entity to
2 provide parts of documents. If they have a document,
3 they're supposed to provide the entire document. They
4 can't pick and choose, "I'll give you these two pages
5 and not those five pages."

6 We have asked for this. It's an
7 integrated document. It is a whole, and we are
8 entitled to it.

9 In terms of the implications of these
10 documents, they remain a document that, despite
11 whatever is suggested regarding other material that
12 has been provided, this is the foundation of
13 representations made in the course of the direct case
14 that they own or that claimant representatives owned
15 the interest with respect to these programs in 1997.

16 The documents and -- it is clear from our
17 review of the material, are produced by CDC initially
18 and either attached to the representation agreements
19 or communicated to the companies with respect to those
20 representation agreements. How they are developed
21 goes to, in part, as you said, the TV data
22 information.

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1 There may be information from Nielsen, and
2 we'll get to some of those questions later on as to
3 whether or not all of the material has been provided
4 that is the foundation of this.

5 But CDC produces this material, sends it
6 to the companies. How they develop that list, how
7 they make determinations regarding ownership,
8 distribution, and associations are fundamentally among
9 the frustrations that we have with regard to the
10 documentation that we will, as I said, probably get to
11 this afternoon.

12 But at this point, it has been asked for,
13 it has been moved on a Motion to Compel, it has been
14 compelled, and it hasn't been delivered.

15 I reject the suggestion, as I believe you
16 should, that they don't rely upon this as a document.
17 They do rely upon it as a foundation of their case.
18 Did they rely upon it in the production of Exhibit 3?
19 They say they haven't, and we have no basis to
20 challenge that. And, therefore, they are relying upon
21 the only documents that they used to develop
22 Exhibit 3, according to their answers to discovery,

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1 the claim forms filed with the Copyright Office.

2 As we indicated, those claim forms have
3 approximately 125 program titles listed. That's it.
4 When counsel, in their pleadings, make an argument
5 now, which is, frankly, untested and contradictory to
6 the prior information, that they relied upon
7 production of Exhibit 3 based upon 1996 reports --
8 that's the first time we heard that -- that doesn't
9 jive with what they've told us before.

10 But we would get to that -- I mean, that's
11 a fair question for cross examination. It's not an
12 issue for the Motion to Dismiss -- Motion to Strike.
13 For the Motion to Strike, we focus on these 1997
14 reports, and we say that they are part and parcel of
15 the representation agreements, and you can't get the
16 representation agreements in this case without these
17 certified statements because they are one document.

18 We have reference in our pleadings to the
19 fact -- quoting the MPAA where they look at these two
20 components as being part of the way that they make
21 their determination. It's one document. They've
22 given us half of the document, and our position is if

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1 you give us half the document you're not entitled to
2 use that document in this proceeding. If you give us
3 the whole document, you can use it. And so we move to
4 strike those portions of the case that rely upon that
5 whole document.

6 JUDGE COOLEY: Madam Chair, I'd like to
7 just make one comment for the record.

8 JUDGE CAMPBELL: Certainly.

9 JUDGE COOLEY: I know both sides have
10 argued what the discovery rules say, but I just want
11 to draw your attention to the fact -- Section
12 251.46(d), "Each arbitrator may examine any witness or
13 call upon any party for the production of additional
14 evidence at any time." I just want to make you aware
15 of that.

16 So that if we believe that either side's
17 case, for whatever reason, doesn't explain everything
18 to our satisfaction to allow us to do the job that we
19 have been appointed to do, we are going to ask for the
20 introduction of additional evidence. So just so you
21 know that today.

22 JUDGE CAMPBELL: One moment, please.

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1 (Whereupon, the proceedings in the
2 foregoing matter went off the record at
3 12:31 p.m. and went back on the record at
4 12:32 p.m.)

5 JUDGE CAMPBELL: Could I have your
6 attention, please? What we would like to do is --
7 this is a good time to break for lunch, and we'd like
8 to break -- it's almost 12:35 -- until 1:45. And
9 during that time, we not only encourage but urge you
10 to talk to each other, perhaps to work out some of
11 these issues that are loose ends, perhaps even
12 misinterpretations of each other's examination of the
13 materials, or examination of what is being requested.

14 A lot of this should and could be worked
15 out among you in conversation, so that we can move
16 forward and enable the parties to be fully and fairly
17 heard, not just today but the week of January 8th. I
18 think some of this should be -- some of these
19 questions be resolved through civil discussions among
20 the lawyers and with regard to whom they represent.

21 So we encourage you to do that. We will
22 see you back here about 1:45, which gives you an hour

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1 and 10 minutes. And I hope that there is some
2 fruitful result out of these discussions.

3 Thank you.

4 (Whereupon, at 12:33 p.m., the proceedings
5 in the foregoing matter went off the record.)
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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:45 p.m.)

JUDGE CAMPBELL: Please be seated.

Anybody have anything to report?

MR. LUTZKER: We spoke.

(Laughter.)

JUDGE CAMPBELL: Well, that's -- that's a start.

MR. TUCCI: We shook hands.

MR. OLANIRAN: We shook hands. We exchanged pleasantries.

JUDGE CAMPBELL: Well, I heard the pleasantries a few minutes ago. It was much better than the non-pleasantries prior to lunch.

Okay. But nothing other to report.

MR. LUTZKER: Nothing --

JUDGE CAMPBELL: Nothing of substance to the record, correct?

MR. LUTZKER: Not at this moment.

MR. OLANIRAN: Well, I had something for the record that I think we posed the question to IPG whether there were any documents that we can provide

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1 at this point that would sort of either appease them
2 or sort of resolve some of the issues and their
3 response, that it's way too close to the hearing to
4 produce these documents. So, my impression, at least,
5 is that they want to see a resolution of the motions
6 themselves.

7 JUDGE CAMPBELL: Mr. Lutzker, points on
8 your motion.

9 MR. LUTZKER: Well, you know, we're here
10 doing the motion, and I agree with that. I guess just
11 to add a parenthetical around sort of the last
12 discussion at close of this morning's session,
13 obviously the Panel can ask for whatever documents the
14 Panel chooses to ask for. We certainly have no
15 objection or concern about that.

16 The issue is, however, as we understand --
17 as I understand sort of the Copyright Office's
18 procedure with respect to the discovery process, at
19 some point in time during the discovery between the
20 parties a motion to strike if documents haven't been
21 presented is appropriate to be presented. If the
22 record at that point in time is the record at that

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1 point in time, the motion to strike is granted.
2 Certain things are struck from the presentation of the
3 party. If it's not granted, the case remains the
4 same.

5 At that point in time, if the case remains
6 the same, or whatever the case remains after the
7 motions to strike have been addressed, if additional
8 documentation is needed by the Panel to supplement
9 that, then that's the way I would interpret that rule
10 -- during the course of the hearing additional
11 material can be provided.

12 But I would not want to preclude --
13 because we've said, and I think Mr. Olaniran's comment
14 is correct. I mean, we are reluctant at this point to
15 simply say that an adequate relief for us is simply
16 give us the documents now. Our feeling is they ought
17 to have been given before.

18 They were compelled. If you agree, then
19 certain activities or decisions result from that fact.
20 If you disagree, you disagree, and I know we obviously
21 are turning to you for ultimate guidance and
22 resolution. But once the matters have been stricken

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1 from the record, then the rest of the case remains,
2 and that's the record upon which additional questions
3 and commentary and perhaps documents would be
4 compelled by the Panel.

5 I'd like, if I could, by virtue of
6 scheduling, address the MPA viewer study first if this
7 is okay. Mr. Galaz, my client, will be leaving this
8 afternoon, flying back to Texas, and he had sort of
9 scheduled this in anticipation of the proceeding being
10 done. And he's probably going to have to leave a
11 little after three o'clock.

12 MR. GALAZ: Three-thirty now.

13 MR. LUTZKER: Oh, it is three-thirty?

14 MR. GALAZ: Yes, three-thirty.

15 MR. LUTZKER: Oh, okay. So, I want to
16 make sure, because the viewer study is -- it embraces
17 some of the other material, and it's really, as I
18 think the Copyright Office described, the most
19 significant of the documents. And if there's any
20 questions that his presence would be useful for, it
21 would, I think, hopefully help the Panel address this.

22 Again, I think the pleadings are

1 relatively clear, and what is in my view perfectly
2 clear are the orders of the Copyright Office in this
3 regard. We have characterized in our motion the
4 phrase "the MPA viewer study." I don't think that
5 phrase necessarily appears within the direct testimony
6 of the MPAA.

7 Nevertheless, it is a distillation of all
8 the critical documentation that makes up the numbers
9 and the analysis and interpolations that are essential
10 to a fair resolution of evaluations associated in this
11 case. And we use that phrase because it does appear
12 in the copyright orders, as they sort of have
13 described this.

14 In the order of the 28th of June, the
15 Copyright Office speaks to this at page 8 of that
16 order. They call the program suppliers viewer study
17 sponsored by Kessler a principal piece of evidence for
18 the distribution, for the study combines information
19 obtained from Nielsen Media Research Group regarding
20 nationwide viewership of 1997 syndicated programs
21 represented by them, the program suppliers, with
22 information from CDC regarding distant viewership of

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1 those programs and cable systems.

2 Apparently, CDC has its data, and Nielsen
3 has -- and the Nielsen data, and the process is in
4 electronic format. They apply formulations and
5 analysis. They interpolate this information. And
6 this becomes the bottom line viewing hours
7 attributable to programs that is so much of the
8 essence of their case.

9 And what we have in phase two, which
10 doesn't appear in phase one, and obviously there isn't
11 a phase one proceeding in this case, but in phase two
12 we have a program by program analysis. We have a
13 pinpoint in connection with this viewer study and
14 analysis of viewing hours so specific and so detailed
15 that claims are made and representations are made as
16 to how much a specific program is worth under the MPA
17 analysis. And that in turn forms their distribution
18 to their clients, and it forms their evaluation of the
19 IPG programming. Thus, by any stretch of the
20 imagination, this is absolutely vital information if
21 you're going to do an analysis of this case.

22 In the course of numerous questions asked

1 six ways from Sunday, IPG has requested this
2 documentation. The Copyright Office clearly and
3 unequivocally understood we asked for it, and in their
4 order of June 28th said not only are we entitled to it
5 but to the extent that the MPA thinks that we would
6 have to go to CDC and sort of like rummage around and
7 ask for information, we don't have to do that. It's
8 not to say that there shouldn't be communication to
9 help understand what's going on, but it's not our
10 obligation to sort of identify the material in this
11 vast bulk of the CDC material as to what constitutes
12 their viewer study. They have to provide it to us.

13 And unlike what had been presented before
14 where MPA was giving instructions to CDC, give it to
15 them but charge them, charge IPG for this information.
16 They Copyright Office says, "You, MPA, provide this or
17 have your agent, CDC, provide this information at your
18 cost.

19 So, the bottom line, the June 28th order
20 was crystal clear: Provide all the documentation --
21 electronic files, paper files, whatever it takes --
22 provide that information so IPG has in its possession

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1 the viewer study. That's the order.

2 We're here saying, we don't have it.
3 They're saying, "Well, you didn't ask for it" or "We
4 gave it to you and you don't understand it. We've
5 incorporated by reference documents from prior
6 proceedings." We accept all the documents that have
7 been received, and we will not deny that some
8 documents have been provided. To the extent that TV
9 data logs are part and parcel to this, we have some of
10 the TV data logs, as we discussed. We have some data
11 from Nielsen. But as our documentation is presented
12 in the course of our motions, there's obviously
13 material missing.

14 There's obviously material that we've
15 asked for in different ways and that hasn't been
16 provided. And how do we know that? Well, we know it
17 by, first, observation. One of the things that we
18 ultimately -- it was a little bit of pulling teeth but
19 we ultimately got what we call this alpha list, which
20 is in the attached sample pages to our initial
21 pleading on that.

22 The alpha list identifies programs by

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1 title, by owner, and attributing viewing hours. It
2 also provides in the top corner BIB code numbers. And
3 the BIB code numbers are very specific numbers. You
4 can look at a BIB code number, and these are multi-
5 digit numbers, and presumably they come from a BIB
6 code source.

7 Now, one of the things that we were
8 provided in the course of our discovery were BIB code
9 books that MPAA said, "We didn't rely upon these," and
10 they presumably didn't, because they were 1998 to 2000
11 BIB code books, but they provided them in sort of a
12 gracious attempt -- that's the way I interpret it --
13 to assist IPG's analysis. And the BIB code books have
14 numbers associated with each of the programs. The
15 unique aspect of this is those BIB code numbers in the
16 BIB code book don't match the BIB code numbers in the
17 alpha list. CDC is interpolating material, and we
18 don't know where those numbers come from.

19 Now, the BIB codes are not necessarily
20 definitive, but I mean presumably for us it's a clue.
21 It's a clue that there's documents that exist in this
22 database, this MPAA viewer study, that are necessary

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1 to understand and relate this information that we
2 haven't been provided. And all we asked for
3 originally was provide it. The Copyright Office said,
4 "Give it." And we are, at this late date, in a
5 situation where the documents haven't been provided,
6 and it's evident from the material that there are
7 things missing with regard to this.

8 It is quite critical that MPA has already
9 acknowledged that there is intermediary electronic
10 data that is developed by CDC that gets from the raw
11 data, if you will, from Nielsen and from TV data logs
12 there's intermedia electronic data, and then there's
13 final data. And we don't have access to this
14 material. And we think if this viewer study is going
15 to be provided, we must have the electronic data in
16 order to make a case.

17 Now, again, as I said earlier, it does us
18 little good at this stage, having asked for this
19 material in April, now that it's December, a few weeks
20 from the trial, to be provided this material. We feel
21 in June, at the very least, having filed motions to
22 compel, having the Copyright Office issue their order

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1 to compel the delivery of this documentation, to the
2 extent it has not been provided, June, the clock was
3 running.

4 It is now six months later, and the
5 failure to deliver this must have consequences, and
6 the consequences are, as we indicated, the necessity
7 of striking certain information. And we say this
8 recognizing that this is the heart of this MPAA case,
9 but for some reason they've chosen to avoid providing
10 this necessary documentation to us in the course of
11 our discovery proceedings.

12 And as you can sort of read from this
13 process, the Copyright Office had opportunities to
14 deal with this issue not really on one occasion but on
15 two occasions. There were multiple occasions in
16 September they also acknowledged this material has got
17 to be provided, and it hasn't been provided. And we
18 don't have adequate explanation except you haven't
19 asked for it properly or you need to look back at
20 testimony that we've incorporated our reference.

21 The reference testimony, incorporated by
22 reference, cannot satisfy the obligations that MPA has

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1 in this case. They can't satisfy it because, first of
2 all, that documentation relates, at best, to the '90
3 to '92 proceeding and the 1989 proceeding. It does
4 not relate to the 1997 proceeding. There may be
5 explanatory material which we have an obligation to
6 review and consider; I accept that. But when you're
7 talking about the data, the interpolation of data for
8 1997, you can't reference back five, seven, ten years
9 to material that is not pertinent to the 1997
10 proceeding. I will rest there.

11 JUDGE CAMPBELL: I have a question.

12 MR. LUTZKER: Sure.

13 JUDGE CAMPBELL: On page 34 of your motion
14 to strike testimony and preclude introduction from
15 evidence, I'm a little confused about numbered item
16 one there. You're saying that the Exhibit 13 alpha
17 list contains data that is non-existent with any of
18 the electronic files produced, and then you show a
19 comparison. But then you say a cursory review of the
20 substantial amount of data appearing in these columns
21 substantiates that significant intermediate electronic
22 data was utilized in order to create the alpha list,

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1 electronic data that was not produced. It sounds like
2 what you're saying is Exhibit 13 is giving you some of
3 the data you didn't think you had. And if you've got
4 it now --

5 MR. LUTZKER: Exhibit 13 takes piles of
6 information and applies it, interpolates it to come up
7 with an end result, okay?

8 JUDGE CAMPBELL: Right.

9 MR. LUTZKER: Now, the intermediate
10 processes that go on have an electronic existence.
11 You cannot get from the mere provision -- I mean the
12 electronic files we have are certain Nielsen data and
13 certain TV data, and then we have this printed
14 document. You cannot get from those two documents to
15 the alpha list in a straight line.

16 JUDGE CAMPBELL: So, you still say even
17 though I have 11, 12, 13, and 14, it's still not
18 enough. Is that what you're saying?

19 MR. LUTZKER: Eleven, 12, 13, and 14 need
20 other material to get --

21 JUDGE CAMPBELL: To give the chain of
22 title, perhaps?

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1 MR. LUTZKER: Well, 13 is the alpha list.
2 Eleven, 12, and 14 need other material to get to 13.

3 JUDGE CAMPBELL: Right.

4 MR. LUTZKER: Okay.

5 JUDGE CAMPBELL: To have that chain
6 completed you're saying you still don't have enough.

7 MR. LUTZKER: And that's what the
8 Copyright Office has said is the viewer study. It is
9 the interpolative material. The Copyright Office said
10 we're entitled to that material, and it hasn't been
11 provided. It exists presumably in electronic form,
12 and it resides with CDC. We cannot, by virtue of the
13 nature of the material, be omniscient about it. We've
14 asked for the documents. They've been ordered to be
15 and compelled to be produced, and they haven't been
16 produced.

17 JUDGE CAMPBELL: Mr. Olaniran.

18 MR. OLANIRAN: Yes, Your Honor. We are
19 completely mystified as to what it is that they're
20 asking for. The so-called MPA viewer study consists
21 of the Nielsen study, the interpolation that's done by
22 CDC, the TV data data, and the ownership information

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1 with CDC. All of this information combined produces
2 the alpha list that's on Exhibit 13. So, when you
3 pose the question whether Ms. Kessler relied on it for
4 her testimony and could produce that, I think that
5 answers the question.

6 In addition, when they wanted the
7 electronic data -- the TV data -- the Nielsen study,
8 the TV data data, and interpolations were already in
9 -- are in electronic form. We made it available to
10 them from CDC. We wrote six letters asking CDC to
11 make it available to them. So, we're not exactly
12 clear as to what it is --

13 JUDGE CAMPBELL: What they want?

14 MR. OLANIRAN: -- that they don't have.

15 And, secondly -- I mean there's an attempt
16 to create the impression that we sort of dragged the
17 info of the documents out. The fact is we all along
18 had an issue with confidentiality, and the
19 confidentiality order was not adopted until September
20 21st, which is why the documents that had to do with
21 the ownership information was not given to them. And
22 that was really the only issue at that point. We have

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1 always made all of the documents available to them,
2 other than the ones that are subject to
3 confidentiality.

4 Now, if they think other documents exist,
5 I'd like to think that we're more aware of our
6 database than they are. If they think some other
7 documents exist that we haven't produced, well, they
8 can, again, ask on cross examination. I mean this has
9 been actual frustration, and I attach a letter that I
10 wrote Counsel that appeared on the proceeding stating
11 like, "I'm not sure exactly what you're looking for.
12 This is what is in our database, and we've produced
13 them to you."

14 So, again, the documents that they've
15 asked for we've produced. To the extent that they
16 feel they don't understand how the document is made or
17 anything like that, they can certainly cross examine
18 Ms. Kessler on the issue.

19 MR. LUTZKER: Ms. Kessler's direct
20 testimony has a number that presumably supports the
21 claim of 99.99 -- it may go -- the numbers -- the
22 nine's may go beyond that -- of their entitlement in

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1 this proceeding. That number specific in her
2 testimony is three billion, four hundred million and
3 change. We asked for the documents that underlie that
4 number. We don't have it.

5 We have received -- the only document that
6 we've received that has numbers -- and we point this
7 out in our exhibit and our material -- that has
8 numbers is this alpha list, which incidentally is
9 precisely a list that earlier in discovery they said
10 did not exist. The document in fact is dated March
11 17, three weeks before testimony was filed with the
12 Copyright Office. But that document they said doesn't
13 exist in answer to testimony and in answer to
14 discovery request.

15 Okay. It turns out the document does
16 exist. The document -- if you look at the document,
17 it has sort of lots of numbers on it; it has sort of
18 at the end a tabulation total, the numbers don't
19 relate to the number in Ms. Kessler's testimony. They
20 have not communicated to us that that's the document
21 that answers the magic question: What constitutes
22 \$3.4 billion in change of their viewing claim? They

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1 haven't answered that.

2 It is our understanding that other
3 material exists. He said, as an example, we did have
4 debate about ownership information. If you recall,
5 the debate was resolved by a regrant of a protective
6 order, ownership information should be provided. We
7 have no electronic ownership information provided
8 through CDC that directly answers the questions as to
9 who owns what program. There's obviously a BIB code
10 electronic document, in our view. It has not been
11 provided.

12 The critical components here also relate
13 to the letter correspondence. The letter
14 correspondence of Ms. Kessler, most of which we were
15 not privy to because it was a direct communication
16 between MPA and CDC, seemed to suggest, okay, make the
17 stuff available, and they understand full well that
18 Mr. Galaz is handling the interpolation of material
19 that we receive. We explained that before starting in
20 early summer. They knew that Mr. Galaz couldn't
21 access the CDC material on the TV data logs. He was
22 in communication, as their memo says, with CDC on

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1 interpretation of that.

2 So, at the very time memos go to say make
3 this available to Mr. Galaz, there are pleadings filed
4 with the Copyright Office saying, confidentiality is
5 critical to this documentation. Mr. Galaz can't see
6 one piece of paper that identifies ownership. There's
7 something goofy going on here. They may or may not be
8 producing memos that say be productive, and it makes
9 sort of a fine case, but -- I mean, I'll get to
10 another aspect of that -- but fundamentally their
11 legal position before the Copyright Office is there's
12 a wall between that information and Mr. Galaz.

13 So, a document that says make it available
14 to him, on the one hand, and the reality is the effort
15 to fight that availability, suggests at least a
16 reasonable question as to how useful those letters and
17 documents are in this proceeding.

18 I'll stop for now and allow sort of --

19 JUDGE CAMPBELL: Do you have a response?

20 MR. OLANIRAN: I just have a couple of
21 things. I think it's absolutely incorrect that we
22 said the documents did not exist. What we said all

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1 along was that the documents that we were going to
2 provide contained information that we considered --
3 that would be subject to a protective order. And we
4 all along tried to get them to execute a protective
5 order that had been used in previous proceedings, and
6 they refused.

7 We ultimately got -- agreed on a
8 protective order which was not approved, again, until
9 September 21. And after that was done, the documents
10 were made available to them.

11 Mr. Lutzker just said that they don't have
12 any ownership information. Exhibit 13, which is the
13 alpha list, which we produced to them after the
14 protective order, identifies the ownership
15 information, and that was one of the exhibits that we
16 could not produce until we had a protective order.

17 So, again, it seems like the issues are
18 being manufactured when indeed there are no issues,
19 and we've expressed this over and over again. We have
20 produced all the documents that Ms. Kessler relied
21 upon. They said, well, the three billion number,
22 there's nothing in the record. Exhibit 13 is the

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1 source of the three billion number figure that Mr.
2 Lutzker is referring to.

3 Now, if there's a quibble about whether or
4 not the three billion number is accurate, again,
5 that's a subject for cross examination, not a motion
6 to strike. I can't imagine that you would agree on
7 everything we give them, but again I don't expect to
8 be doing cross examination by discovery, which is
9 exactly what I think they're trying to do. I really
10 don't think there's an issue here. I think the issue
11 is with them.

12 MR. LUTZKER: The alpha list, which we
13 asked for and which we were told in prior discovery
14 did not exist, obviously did exist. The alpha list --
15 you cannot look at the alpha list and come up with Ms.
16 Kessler's direct testimony or the statements in the
17 direct testimony. There's obviously other summaries,
18 documents, and reports that CDC needed to produce that
19 information to Ms. Kessler. As the opponent in this
20 case, under the CARP rules, we're entitled to that
21 material. The Copyright Office has ordered this
22 material on multiple occasions.

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1 This gets to probably, as I said earlier,
2 the most essential documentary information before us,
3 and we know for facts that there are documents that in
4 fact did exist, even though they said they didn't
5 exist in earlier responses. It also is evident that
6 I defy anyone on the Panel to take a look -- we gave
7 you samples; we could produce the entire 113 pages of
8 this list -- I defy you to look at that list and then
9 to come up with a bottom line number, a bottom line
10 number of three billion four hundred and change that
11 appears in that direct case. There's obviously other
12 material, other reports, other interpolations that are
13 going on.

14 We asked for two things, which the
15 Copyright Office said we are absolutely entitled to.
16 We asked for the documentation that the memos and
17 summaries that are prepared, and if they exist in
18 electronic form, our requests and their requests
19 mirror each other in terms of definition of documents.
20 The electronic files are documents; no issue about
21 that. If there are electronic files at CDC that are
22 produced to create bottom line numbers, there is

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1 nothing clearer in this proceeding and the ones that
2 have gone before that the bottom line numbers are
3 things that claimants -- opposing claimants are
4 entitled to receive. We are entitled to be able to
5 investigate that. We have been stymied throughout
6 this proceeding, first on the basis of ownership
7 information.

8 If the ownership information was the true
9 issue, was the true issue, there's no reason why we
10 could not have received at a much earlier point in the
11 proceeding the redacted Exhibit 3 without ownership.
12 They could have done this. In fact, as I made clear
13 in earlier pleadings to the Copyright Office, that's
14 precisely what they did in CARP -- in CRT proceedings
15 for about a dozen years. When I was active in phase
16 2 proceedings, the redacted, I'll call it, alpha list
17 -- program, title, viewing hours -- were routinely
18 submitted as an affirmative document in the
19 proceeding. All that information was withheld on the
20 grounds that the ownership information was critical,
21 and we did resolve the ownership information, and we
22 have now the ownership information before us.

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1 But the bottom line is we have been
2 stymied throughout. Bottom line numbers must be
3 provided. They haven't been provided. The Copyright
4 Office has said repeatedly, "Provide it. If it's not
5 provided, motions to strike are appropriate." We are
6 at that stage. We are past the 11th hour. We have
7 not been provided with the material, and I appreciate
8 it goes to the core of the case, but that was their
9 choice.

10 They had the opportunity to provide the
11 documentation at early stages from day one. They know
12 this is critical information. They know she said 3.4
13 and change billion hours. They haven't provided us
14 the documentation that supports that. And we're --
15 we've been frustrated. We made our complaints,
16 pursuant to the Copyright Office procedure, motions to
17 compel. The motions to compel were granted. The
18 motions to compel were ignored. And here we are, it's
19 December, three weeks away and we still don't have the
20 documents.

21 JUDGE CAMPBELL: Mr. Olaniran, did you
22 have --

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1 MR. OLANIRAN: Just brief. I just need to
2 clarify. The alpha list, again, we did not produce
3 until we had a protective order. And one of the
4 reasons we didn't do that was because of the ownership
5 information. In addition, it was also a calculation
6 of viewing hours, which ultimately leads to
7 distribution of royalties which at that point we
8 thought was confidential information.

9 Even after 20 minutes or so, I'm still not
10 clear what document we haven't produced. If the
11 argument is, "Well, your numbers don't add up," well,
12 that's fine. Let's examine that at cross examination.
13 But to suggest that some document exists which they
14 haven't readily identified and they're not really sure
15 what it is and we certainly don't know what it is, I
16 don't think there's any logic to that.

17 JUDGE CAMPBELL: I have a question for
18 you. Do you have this motion with you?

19 MR. OLANIRAN: Yes, I do.

20 JUDGE CAMPBELL: All right. If you will
21 pull Exhibit 13, please, and if you'll look at the
22 last page on Exhibit 13, not page 113 --

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1 MR. OLANIRAN: The last page?

2 JUDGE CAMPBELL: -- but the next page,
3 which shows the numbers of properties, 6,062. The
4 page right before Exhibit 14.

5 MR. OLANIRAN: Okay. I'm there.

6 JUDGE CAMPBELL: All right. And then you
7 have a figure of 510,885 and then a figure of
8 1,356,127 and then --

9 MR. OLANIRAN: Oh, I'm sorry. I'm not
10 there.

11 JUDGE CAMPBELL: The very, very, very last
12 page. Aha, that's it.

13 MR. OLANIRAN: Oh, okay.

14 JUDGE CAMPBELL: And then you have at the
15 tail end of that on the computer generated numbers a
16 three billion number.

17 MR. OLANIRAN: Yes.

18 JUDGE CAMPBELL: And under that the MPAA
19 3,384,704,566.

20 MR. OLANIRAN: Right.

21 JUDGE CAMPBELL: Can someone explain to me
22 what that computer generated line refers to? The

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1 number of properties, I presume, is 6,062 properties
2 were listed.

3 MR. OLANIRAN: That's correct.

4 JUDGE CAMPBELL: And then perhaps there's
5 -- one of those categories may be viewing hours
6 possibly?

7 MR. OLANIRAN: I think the final category,
8 the 3.6 billion, is the viewing hours.

9 JUDGE CAMPBELL: Is the viewing hours.
10 And then the 3,384,706,566 calculation based on the
11 viewing hours?

12 MR. OLANIRAN: Yes. I'm sorry.

13 JUDGE CAMPBELL: Is that a calculation
14 based on the viewing hours, the 3,384,706 --

15 MR. OLANIRAN: That's correct.

16 JUDGE CAMPBELL: -- 704 --

17 MR. TUCCI: MPAA claimants.

18 JUDGE CAMPBELL: Right. So, I don't
19 really have a question. It makes sense to me.

20 MR. TUCCI: There's two different
21 universes.

22 JUDGE CAMPBELL: We're not finished yet.

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1 Better hold that out, that last page again. We have
2 a 510,885. What is that number? At the top of the
3 page, it says number of properties, 6,062, then
4 510,885.

5 MR. OLANIRAN: Which page?

6 JUDGE CAMPBELL: It's the same page we
7 were talking about. It has one line at the top. It
8 says number of properties, 6,062, and then it says 510
9 comma 885. Is that a BIB code number or is that a
10 code for the totals?

11 MS. KESSLER: Madam Chairman, I don't know
12 what the number is. It's nothing anything that I
13 needed, so I don't know what it is.

14 JUDGE CAMPBELL: And then the 1,356,127,
15 do we know what that refers to?

16 MS. KESSLER: I personally do not, and I
17 don't use it.

18 JUDGE CAMPBELL: And the three billion
19 three plus is Worldwide's plan to extend the viewing
20 hours to three billion six, correct?

21 MR. OLANIRAN: Correct, for the MPAA
22 claimants in this proceeding.

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1 JUDGE CAMPBELL: Right. For the claimants
2 listed, the 6,062 properties based on the alpha list
3 as you've provided it?

4 MR. OLANIRAN: Yes.

5 MR. TUCCI: No.

6 MS. KESSLER: I'm sorry. Yes, no.

7 (Laughter.)

8 JUDGE CAMPBELL: I think that's what
9 they're trying to get to. Let's go through again.
10 We've got an alpha list with roughly -- it says number
11 of properties, 6,062. I presume that means 6,062
12 properties.

13 MR. TUCCI: Can we confer for 30 seconds?
14 I don't have it with me.

15 JUDGE CAMPBELL: Oh, absolutely. If you
16 want to, you can go down to that little hallway if
17 that will make it easier, the reception area. Feel
18 free. We'll just go off the record for a minute.

19 (Whereupon, the foregoing matter went off
20 the record at 2:28 p.m. and went back on
21 the record at 2:30 p.m.)

22 JUDGE CAMPBELL: All right. Are we back

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1 on point?

2 MR. OLANIRAN: Okay. The question about
3 the alpha list, the alpha list is the list of all
4 titles, all syndicated category titles.

5 JUDGE CAMPBELL: So, you had -- keep
6 going.

7 MR. OLANIRAN: Everybody that contains
8 MPAA titles, IPG claims titles that are unclaimed.
9 The number, 3.3, that's handwritten is the MPAA
10 portion of that. Now, that may have led to the
11 confusion of the documents, but as far as the document
12 that we relied on for the viewing hours this is it.

13 JUDGE CAMPBELL: That helps. Now, if you
14 don't have anything else to say, I'm going to ask Mr.
15 Lutzker a question.

16 Mr. Lutzker, does this help at all --

17 MR. LUTZKER: Well --

18 JUDGE CAMPBELL: -- to clarify at least a
19 few things?

20 MR. LUTZKER: -- let me read to you from
21 their briefs. In response to a request for all
22 documents underlying the calculated value of viewing

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1 hours for each MPA program and each IPG program, that
2 was a document request. All documents underlying the
3 calculated the values that appear in the direct case.
4 Their answer is the thrust of this issue is that IPG
5 seeks a report that shows MPA represented programs and
6 the associated viewing hours on a program by program
7 basis. They continue, "As program suppliers have
8 stated, no such report exists." No such report
9 exists. This is in their -- it's cited in our brief,
10 in our reply brief at page 21, no such report exists.

11 Now, this report, the alpha list, has a
12 date of March 17, I believe, two weeks before the
13 filing of the case. The Copyright Office, in its
14 order of the 28th, compelled the production by program
15 suppliers of the underlying data, the interpretative
16 data, and reports prepared by CDC. Later on, as you
17 know, the fact that MPA does not have custody and
18 control of those reports was not deemed an excuse upon
19 which not to deliver that material.

20 The bottom line is they say that the alpha
21 list didn't exist. It obviously existed, whether Ms.
22 -- now Ms. Kessler seems to be saying, at least this

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1 is what I'm interpreting her counsel, "Oh, yes, I
2 relied on that report for the development of the
3 direct case claim for the 3.3 billion hours." But the
4 curiosity is -- the curiosity in their direct case,
5 they don't claim 3.3, and if you can read that number
6 -- three point -- what was it?

7 JUDGE CAMPBELL: 3.384,704,566.

8 MR. LUTZKER: Okay, 3.384. They claim 3.4
9 billion hours. Over a hundred -- three point -- their
10 direct number is 3.487,949,073 viewing hours. They
11 also indicated that all syndicated programs have 3.488
12 --

13 JUDGE CAMPBELL: Did you say viewing
14 hours?

15 MR. LUTZKER: Viewing hours.

16 JUDGE CAMPBELL: The 3.384 is the dollars
17 claimed based on viewing hours. The viewing hours
18 that were shown here were 3.611, so it's -- they
19 reduced it down. They may have recalculated.

20 MR. LUTZKER: They're not claiming \$3.3
21 billion.

22 JUDGE CAMPBELL: Then I misunderstood.

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1 MR. OLANIRAN: What page are we on, just
2 to be --

3 JUDGE CAMPBELL: Again, the magic last
4 page of the Exhibit 13.

5 MR. LUTZKER: Those are viewing hours.

6 JUDGE CAMPBELL: The viewing hours are
7 3.6, and the dollars claimed based on viewing hours is
8 the other figure?

9 MR. LUTZKER: No.

10 JUDGE CAMPBELL: What was that other
11 figure then?

12 MR. LUTZKER: The other figure is the
13 viewing hours that are attributable to MPAA programs,
14 okay? Total viewing hours, 3.6; total MPA viewing
15 hours, according to the alpha list prepared in March,
16 which they say did not exist, which now they suggest
17 or state -- I don't know how to word it at that point
18 -- was the basis upon which they prepared their direct
19 case. But in the direct case, they speak about 3.487
20 billion viewing hours, 100 million hours difference.

21 In our view, there are intermediary
22 documents that were prepared that were not provided

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1 that are fundamentally ask worthy, are electronic
2 files. They may or may not exist in a format as neat
3 and clean as that.

4 And I would add that -- you draw your own
5 judgments from this. We asked for documents that
6 related to the alpha list. We end up being delivered
7 a document -- in the case of TV data and in the case
8 of Nielsen, we're provided electronic files. We're
9 provided disks that we then can put into our computer
10 and work with. In the case of the alpha list, which
11 obviously is generated from an electronic file, we're
12 provided the printout.

13 Now, whether that document physically
14 existed, was composed or dated, you know, someone will
15 have to answer that on examination assuming that that
16 right now is one of the documents we were provided in
17 discovery. So we're entitled through discovery we can
18 find out, we can inquire about the nature and intent
19 and purpose of that particular document. But clearly
20 that document comes from the files and the underlying
21 material that the Copyright Office said months and
22 months and months ago and repeatedly said we're

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1 entitled to and repeatedly said if we don't get their
2 claims based on this viewer study, it must be
3 stricken.

4 JUDGE CAMPBELL: Can you turn, please, to
5 your Exhibit 13? I just want to make sure I'm
6 following exactly the process.

7 MR. LUTZKER: Oh, okay. I got it.

8 JUDGE CAMPBELL: And let's pull -- let's
9 just look at the bottom one, Addams Family Values.

10 MR. LUTZKER: Okay.

11 JUDGE CAMPBELL: I presume that's an MPA.

12 MR. LUTZKER: The first page, correct?

13 JUDGE CAMPBELL: Yes.

14 MR. LUTZKER: Page one.

15 JUDGE CAMPBELL: The very front page.
16 Bottom of the page, Addams Family. If you look on the
17 column, household viewing hours, it's 67,414.

18 MR. LUTZKER: Right.

19 JUDGE CAMPBELL: Is it my understanding
20 that one of the things you're looking for is how they
21 got to the 67? What backup information created that
22 67?

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1 MR. LUTZKER: Absolutely.

2 JUDGE CAMPBELL: Whatever they did to get
3 there, you wanted to be able to see that too.

4 MR. LUTZKER: And we have been provided
5 electronically the TV data logs and Nielsen material
6 uninterpolated by CDC. We've been provided reference
7 to the 1990 to '92 proceedings and testimony or prior
8 testimony at the CRT and in the other proceeding,
9 which that describes methodology but doesn't provide
10 how do you get to 67,000, because that's the important
11 question in this proceeding.

12 This 67,000 is a figure derived from
13 Nielsen data, from TV log data, interpolated by CDC
14 coordinating with MPAA to distill and manipulate the
15 numbers and come up with 67,000. We have been given
16 TV data logs, but that's not going to tell you 67,000.
17 We've been given Nielsen numbers, and that's not going
18 to tell you 67,000. This other thing -- these other
19 electronic files --

20 JUDGE CAMPBELL: You want the formula --

21 MR. LUTZKER: We want more than the --

22 JUDGE CAMPBELL: -- to get there.

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1 MR. LUTZKER: The formula doesn't tell
2 you, because there are manipulative, interpolative
3 activities going on beyond the -- they have provided
4 a formula, but the formula's not going to give you
5 this information. It's data. We're missing data that
6 CDC has that gets you to that number. And that data
7 exists in electronic files, and it's not been
8 provided. We asked. The Copyright Office said, "This
9 is the most important part of their case, and it
10 hasn't been provided."

11 And I'll add to my earlier reference on
12 the BIB code thing, say, Addams Family Values.
13 There's a five-digit number next to Addams Family
14 Values. The BIB books that we have been provided have
15 six-digit numbers with respect to all the program
16 titles. There is obviously something that generated
17 this BIB code five-digit listing.

18 JUDGE CAMPBELL: I think the two -- if you
19 look at Addams Family Values, go up to action, there's
20 a two dash --

21 MR. LUTZKER: The two is a separate code.

22 JUDGE CAMPBELL: Okay.

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1 MR. LUTZKER: The BIB code --

2 JUDGE CAMPBELL: That's not the BIB code?
3 So, the BIB code is not 241836.

4 MR. LUTZKER: No. There's no -- that two,
5 as I interpret it, relates to distinctions between
6 movies and series. It may be subject to some further
7 analysis, but in other words it's a classification of
8 certain types of series are one's or two's --

9 JUDGE CAMPBELL: Typecast.

10 MR. LUTZKER: -- and movies are four.
11 But, again, that number comes from somewhere. We
12 don't have that number either. We don't have a
13 document -- we don't have a document that says Addams
14 Family Values belongs to Paramount Pictures. This
15 document says it, but this document did not take the
16 BIB book of 1998 and produce the 1997 ownership
17 information. It didn't take the BIB book of 2000 that
18 we have. It took something else. We don't have that
19 material.

20 There's material that CDC has put together
21 over a period of time focused based upon the
22 responsibilities that have been trusted in them by

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1 MPAA for this proceeding, and we don't have that
2 material. We've asked for it; we've asked repeatedly;
3 we've moved for it; it's been compelled; it hasn't
4 been delivered.

5 At this stage, our motion is pretty clear.
6 We know there's documents there. The suggestion by
7 letters that, "Oh, go to CDC, and they'll provide it
8 to you," that's not our obligation, number one. Their
9 obligation is to provide it to us. They failed to do
10 that. It is questionable whether that really was the
11 case because of their legal brief that suggests they
12 really didn't mean that Mr. Galaz could see it in
13 September when those -- and early when those letters
14 were written. They were fighting diligently to
15 prevent him from seeing it. So, those letters
16 themselves are suspect.

17 And if you go back to the bottom line,
18 which is in the end the Copyright Office has always
19 said bottom line numbers must be supported, must be
20 substantiated, must be provided. They've got a 3.38
21 number. Their claim says 3.487. The numbers don't
22 correlate. Maybe you could find it in here, but

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1 probably there are other documents, other material,
2 other electronic files that have not been provided.

3 And we think the case is obvious on its
4 face that there are things that are missing.
5 Obviously, there are things that are missing. Things
6 that they've provided us were incomplete, and we've
7 been entitled. We've asked for it. We've asked
8 repeatedly, and it's been ordered and compelled, and
9 it hasn't been delivered.

10 JUDGE CAMPBELL: Thank you. Mr. Olaniran,
11 I'm sure you have a response.

12 MR. OLANIRAN: Just briefly. I think what
13 appears to be the only thing that they now claim they
14 don't have probably is the interpolations, because
15 they're not denying access to the TV data data or the
16 Nielsen study. And the ownership information is
17 something that goes back. CDC is the manager of
18 MPAA's electronic database for everything that MPAA
19 does or most things that MPAA does with regard to
20 distribution of royalties.

21 So, I mean, we've made the interpolations
22 available to them. We've made the Nielsen study

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1 available to them, the TV data, and the ownership
2 information. When they ask the question what did Ms.
3 Kessler rely on for the viewing hour calculations,
4 we'll produce the document. Now, if the numbers don't
5 add up again, they can ask us about it on cross
6 examination, and then maybe they'll get an answer that
7 probably explains it.

8 Secondly, in the reply brief on page 21,
9 our response that Mr. Lutzker just read, actually is
10 on point. There is no separate document that isolates
11 MPAA programs on a program by program basis and
12 assigns viewing hours. The alpha list is everybody's
13 programming, and that's precisely the point that we
14 were referring to.

15 And in response to the question about what
16 did we rely on for viewing hours, we produced the
17 alpha list. Now, a subset of the alpha list is IPG's
18 programming, MPA's programming. Now, I'm completely
19 mystified as to what else it could be other than this
20 whole position that there's something out there.

21 JUDGE CAMPBELL: Do you have a response or
22 do we want to move on?

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1 MR. LUTZKER: I mean for the record, the
2 suggestion that -- again, I remain mystified. I mean,
3 Mr. Olaniran can say whatever he chooses to say. To
4 say that we have been offered the interpretative
5 material under the circumstances in which the
6 documents that we have are the documents that we have,
7 and there is no interpretive material that has been
8 provided. The suggestion that the report that they
9 deny existing, even to the extent -- if it is a
10 portion of the alpha list, they somehow derive numbers
11 and generated data and information which we were
12 entitled to. They have resisted providing that
13 material throughout this proceeding.

14 And Mr. Olaniran can suggest they've been
15 cooperative, but at every step of the way there has
16 been resistance, which has been frustrating on our
17 part even as we have in the course of our document
18 production we do basically data dumps. And to say
19 that CDC has collected data on ownership for some
20 period of time, well, if they're using it in this
21 proceeding, that's the documents we're entitled to.
22 And if it's a document in electronic form, we're

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1 entitled to the electronic file, period. That's what
2 we're entitled to. That's what the Copyright Office
3 has said. Has it been provided? No.

4 JUDGE CAMPBELL: I think we're ready to
5 move on. Thank you to both sides. I know it feels
6 tedious at times, but it does help, one, to get into
7 the record but more importantly to have everyone here
8 hear it and understand better the issues.

9 Mr. Lutzker, I have a question for you
10 before we proceed. Have we covered what we need to
11 cover while Mr. Galaz is here?

12 MR. LUTZKER: Well, I mean, he's got a
13 little more time, so we can march on. I might want
14 just like a three-minute break to sort of focus on the
15 next section.

16 JUDGE CAMPBELL: Why don't we do that,
17 give everybody a good -- till five of.

18 MR. LUTZKER: Yes. And I don't want to
19 take too long, because I want to take advantage while
20 he's here.

21 (Whereupon, the foregoing matter went off
22 the record at 2:47 p.m. and went back on

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1 the record at 2:59 p.m.)

2 JUDGE CAMPBELL: All right. Thank you.
3 We are going to limit some time here so we can get
4 through everything. Please sit down. And we have an
5 internal CARP meeting with the Copyright Office at
6 five. It was at 4:30, and we just bumped it to five.
7 So, we'll have to -- I think in the two hours we
8 should have plenty of time to get through everything.
9 Right.

10 All right. We finished that issue. We
11 can move on.

12 MR. LUTZKER: Okay. One of the elements
13 that I'll say unfortunately for you is the
14 interrelationship a lot of these things. That's why
15 even though originally we conceived it of as separate
16 motions, we sort of consolidated into one. And as
17 I'll introduce the Nielsen special study, one of the
18 things I want you to keep in mind as you think about
19 the MPAA viewer study is that from our point of view
20 we're a bit handicapped in knowing where one begins
21 and where one ends. But, again, this is an example of
22 the interpolative functionality of CDC representing

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1 MPA in this proceeding.

2 Think of it in this: Nielsen does surveys
3 on its own initiative -- it's its business -- it
4 surveys, both on a meter basis and on a diary basis,
5 television viewers. The focal point of the MPA
6 Nielsen special study addresses the diaries that are
7 taken during sweep periods. There are four major
8 sweep periods, and then there are two supplemental
9 periods, and that's the data that is collected. It
10 covers roughly half the year.

11 One of the things that is missing, and I
12 don't know whether we probably characterize this as
13 the Nielsen special study or whether we go back, as I
14 said, or it's the MPA viewer study, is programming
15 that doesn't come up in the data of Nielsen but is
16 interpolated and projections are made by CDC based
17 upon a block-in of viewing hours where a survey is not
18 done. In other words, if a show runs in December and
19 it's not part of the Nielsen study but it's in the MPA
20 study, how do we know that? How do we know what the
21 viewing hours are with respect to that particular
22 program? That's one of the issues that we feel

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1 whether it's characterized at Nielsen data, CDC data,
2 MPA viewer data, that data is missing. And it sort of
3 impacts the analysis that we make on all this
4 material.

5 With regard to Nielsen itself, we have
6 indicated that we have ultimately received difficulty
7 opening the documents in the Copyright Office. With
8 a push from the Copyright Office, the parties were
9 able to ultimately access the documents sometime in
10 the fall. And there was never any issue with regard
11 to this Nielsen data that it was confidential or
12 subject to any limitations. It was not offered in
13 that context.

14 Where we start from, and this is a
15 peculiarity of a phase two proceeding, because of that
16 very example with the Addams Family where you had
17 67,000 and change viewing hours, it's a very precise
18 number. The precision of those numbers are predicated
19 upon Nielsen data as analyzed and interpolated by CDC
20 with whatever contributions people at MPA make to it.
21 We have a right, because that is the fundamental bit
22 of information, to test the thesis regarding that

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1 data. Did Nielsen survey 10,000 households and come
2 up with this analysis with regard to that particular
3 program? How many people within the survey knew it?
4 What projections were made with regard to that
5 program? These are the types of issues that we may
6 need to get into, we may need to analyze from a
7 statistical point of view to test the reliability of
8 the precise figures.

9 Because remember, the MPA number of the
10 3.3 or 3.4, whatever it turns out to be, is a
11 summation of something else. It's a summation of all
12 these little bits of information. Some of the bits of
13 information are big numbers, and some of them are tiny
14 numbers. How those numbers are devised, developed,
15 what goes into creating those numbers comes from data
16 from Nielsen, comes from the Nielsen study, and we
17 don't have that information.

18 JUDGE COOLEY: I'm sure you're going to
19 get to this, but in your brief you talk about at least
20 two orders where the Copyright Office has ordered
21 production of what you believe are these documents --

22 MR. LUTZKER: Yes.

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1 JUDGE COOLEY: -- is that right? And one
2 of these orders is the June 28th order, I believe, and
3 it's referred to on page 23 of your original
4 memorandum. It's actually quoted there. Then that's
5 the order of October 10th that again refers to
6 documents responsive to certain requests that you have
7 described to be Nielsen disks. Are these the
8 documents that you're talking about right now --

9 MR. LUTZKER: Yes.

10 JUDGE COOLEY: -- in your argument? So,
11 is it your position in a nutshell that we have two
12 orders of the Copyright Office that required these
13 particular documents to the Nielsen special study?
14 Isn't the Nielsen special study covered by these
15 orders? That's what I'm trying to find out.

16 MR. LUTZKER: The answer is these orders
17 combined with the understandings that have been laid
18 out in proceedings that MPA has been involved with, we
19 cite in our brief there were several prior CARP or CRT
20 proceedings where the issue of how many households are
21 involved in the Nielsen study. They know that's an
22 issue. They know it's a relative thing. And there

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1 were orders to compel that information. There were
2 questions about was it confidential from Nielsen's
3 perspective or not. Our view is -- our inquiry into
4 the Nielsen study raises those questions. The
5 documents were asked for; they weren't provided. The
6 Copyright Office says they are to be provided.

7 JUDGE COOLEY: It's as simple as that.

8 MR. LUTZKER: It's as simple as that.

9 JUDGE COOLEY: Do you have anything else
10 to say?

11 MR. LUTZKER: I'll stop for the moment.

12 JUDGE COOLEY: Okay.

13 MR. OLANIRAN: Your Honor, if I understand
14 your question correctly, you wanted to know whether
15 the Nielsen documents that are referenced in those
16 orders are the same Nielsen documents that they are
17 now contending.

18 JUDGE COOLEY: That was my real question,
19 yes.

20 MR. OLANIRAN: Okay. The Nielsen
21 documents that the Copyright Office orders are
22 referring to are the Nielsen disks. We gave that to

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1 them.

2 JUDGE COOLEY: Okay.

3 MR. OLANIRAN: This is something a little
4 beyond that.

5 JUDGE COOLEY: Now, would it be fair --
6 I'm trying to understand what this issue is all about
7 -- it would be fair to say that you disagree on what
8 he requested in the beginning as including the Nielsen
9 special study?

10 MR. OLANIRAN: We have never refused to
11 give up the Nielsen disks. The only problem that we
12 had with the Nielsen disks or that they claim to have
13 was the fact that they could not open the disks. And
14 if you look again at our Exhibit E, it details and
15 references CDC. Now, it's really interesting then now
16 they have produced what appears to be data from the
17 original Nielsen disks that they claim they could not
18 access, and they have also produced what apparently is
19 something that came out of CDC. So, we gave them the
20 Nielsen study. Now they are asking for something
21 beyond that, and I'm not clear what they seem to be
22 asking. But they've asked for the study; we've given

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1 it to them.

2 JUDGE COOLEY: Okay. Can you sit down
3 just a minute, because I want to find out what you
4 want. Please tell us, because I can't figure it out
5 exactly either.

6 MR. LUTZKER: Well --

7 JUDGE COOLEY: There's all kinds of
8 Nielsen data, I think, in this proceeding, okay? And
9 there's going to be. What I want to know is what
10 specifically are you asking for? That's all I want to
11 know.

12 MR. LUTZKER: Partly we may be dealing
13 with definitional terms, okay? When we speak of a
14 Nielsen study, we are looking for the documents and
15 the underlying documents that support the specific
16 claims made in the case. When a viewing hour total is
17 identified, we are entitled to receive the documents
18 in print or electronic form, and in this case it's
19 going to be in electronic form, that provides us
20 sufficient information to test the thesis of that
21 bottom line number, okay? Now, to the extent that we
22 are handed a disk that is penciled on it or engraved

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1 on it Nielsen special study that may or may not be a
2 sufficient response to our inquiry. We have phrased
3 the inquiry to the documentation and the underlying
4 documentation of those bottom line figures. We're
5 allowed to test the thesis of the bottom line numbers.

6 If what MPA is suggesting is that we've
7 given you what we characterize as the Nielsen special
8 study and here it is but this doesn't include a lot of
9 other information that Nielsen uses to get to that
10 study, because this is what's happened in prior CARP
11 proceedings and prior CRT proceedings. The question
12 is, okay, you may give us a document that has certain
13 numbers on it, but there are other documents, there is
14 other information that Nielsen uses to develop that
15 number.

16 JUDGE COOLEY: And is it fair to say --

17 MR. LUTZKER: And we are entitled to that.

18 JUDGE COOLEY: -- you don't know even how
19 to define that information? You don't know what the
20 scope of that information is?

21 MR. LUTZKER: We know it originates from
22 Nielsen. We also know, as we described the MPA viewer

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1 study, that it's interpolated by CDC. But we are at
2 a loss. That's why they, at one point, they said,
3 "Well, if you don't think we gave it to you, you
4 should have asked us. Come back; ask us." We don't
5 completely know until we review the material what is
6 or isn't there.

7 In this case we know precisely some of the
8 things that are not there. You don't know how many
9 households are tested, okay? It's an important point.
10 If I'm making a projection that a certain show has
11 67,000 viewing hours and I tell you I tested five
12 homes in the United States, how reliable is that
13 information. If I tell you that I tested 50,000
14 homes, how reliable is that information? If I tell
15 you something in between, you're going to make your
16 judgment. We're entitled to that information.

17 They know this is part of the study. They
18 know it. They've been told it in prior proceedings.
19 We don't have to sort of write reams of paper to sort
20 of get them off of a -- to get data out of them.
21 There's an element here that I'm concerned, you know,
22 sort of like -- it's not like -- I use the phrase

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1 "being cute," but it's sort of like well, you know the
2 information that's there. The Copyright Office has
3 told you to deliver it. You're in a situation where
4 Nielsen has produced this stuff. They're your agents
5 for these purposes. CDC is your agent for these
6 purposes. Give these people the material that they
7 need to test these theories, to test these numbers.

8 You know, you've incorporated by reference
9 reams of information from prior proceedings about
10 details of experts who explain how Nielsen gets to
11 these particular points. That information may have
12 been provided in prior proceedings. Well, guess what?
13 We need it in this proceeding, we do. We haven't been
14 provided that information.

15 The Copyright Office in its summary form
16 speaks of the Nielsen data, speaks of the MPA viewing
17 data. That's what we're driving at. And it's not
18 sufficient to say we've given you a disk that says
19 Nielsen special study and you must take it. It's sort
20 of like when they give us a document that says this is
21 our representation agreement. It doesn't include
22 attachments. This is our representation. We're

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1 telling you this is what it is. We're telling you
2 this is what it is, and we're saying you know it's
3 more than that.

4 And the discovery rules, as you suggested,
5 there's a cooperation between the parties. You have
6 to provide documents. You don't want to discover in
7 early January that low and behold and whether -- you
8 know, one of the uniqueness of the current proceeding
9 is we don't have a phase one proceeding with all these
10 sort of Nielsen experts and CDC experts that are
11 explaining the whole background so you have a record
12 for phase one that you can import into phase two.

13 We're starting with just phase two. We
14 have no prior record; we have references on past
15 things, and we're going to have somebody -- she may
16 not know how many homes were tested to have the Addams
17 Family come up with that number, but that's a number
18 presumably that we're entitled to test in the course
19 of this proceedings. And if the documents aren't
20 provided to us, we're at a loss. Now, she may not be
21 the right expert to ask about that, but she's their
22 only expert, and they're holding her out as being the

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1 sum total of the case.

2 We're entitled to sort of at least raise
3 these questions, and then you can form your judgments
4 as to the credibility and weight and so forth with
5 respect to the evidence. That becomes your task at
6 that point. But we're entitled to test it. The only
7 way we can test is, as I said, in one of the
8 pleadings, because there's no interrogatories and back
9 and -- no depositions and back and forth, there's a
10 good faith that's demanded of claimants to produce
11 documents that are necessary in this proceeding. And
12 that's really the thrust of all these -- I mean, all
13 these lengthy things.

14 It boils down to that bottom line. Have
15 they been forthright in providing the documentation
16 that we asked for and that the Copyright Office has
17 compelled? I respect the nuances and the precision
18 with respect to sort of, well, you didn't precisely
19 ask for this point, and that may be in some instances
20 a justification for denying certain material,
21 certainly, in answers to direct discovery requests.
22 But once the Copyright Office makes its determination,

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1 once you're working off of their analysis and summary
2 of this, you know what they're driving at. They know
3 better than we do because it's their stuff. And our
4 position is we're entitled to it. We haven't been
5 given it. We know we haven't been given it. We don't
6 know all the things we haven't been given. We've only
7 been able to identify things that -- some of those
8 things. And at this point, we feel those things are
9 material enough that they justify the sanctions that
10 we ask for.

11 JUDGE COOLEY: Okay. Well, what I think
12 he's asking for after hearing this, and I wanted to
13 hear, of course, what you have to say, I think what
14 he's asking for is the underlying data to the Nielsen
15 special study. That's what it sounds like to me. And
16 I guess there are a couple questions. Is there any?
17 And where is it? And can it be produced?

18 MR. OLANIRAN: We don't have underlying
19 documents to Nielsen data.

20 JUDGE COOLEY: Or even electronic data.

21 MR. OLANIRAN: I'm sorry?

22 JUDGE COOLEY: Even electronic data.

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1 MR. OLANIRAN: We don't have electronic.
2 What we have and what we utilized as part of our
3 testimony is the Nielsen report essentially. And,
4 again, I need to explain the Nielsen -- the
5 relationship of the Nielsen study to Ms. Kessler's
6 testimony spoke two or three layers removed. The
7 Nielsen '97 study covers local programming, series,
8 movies, devotional claimants, sports, and so on. So,
9 it's a huge study. It wasn't a study that was done
10 specifically for this proceeding.

11 Now, a portion of that study was utilized
12 with interpolations with TV data data, with ownership
13 information to generate a report that among other
14 things shows viewing hours. Ms. Kessler then
15 references viewing hours in her testimony.

16 In the prior cases that they refer to, the
17 Nielsen study was actually put into evidence and a
18 witness sponsored it, and there was a lot more
19 detailed information about that. This is not that
20 case. We did not put the Nielsen study into evidence.
21 They ask for underlying documents to the viewing
22 hours, which in an indirect way the Nielsen study is

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1 related to that. We give them the Nielsen report. If
2 it had been a book, let's say, they would not have
3 gone down the list of every single of word in the book
4 and say generate underlying documents. We utilized
5 the end results of a portion, indirectly if you will,
6 of the Nielsen study.

7 JUDGE CAMPBELL: Mr. Olaniran, is it
8 correct that the Nielsen study is not a study that was
9 commissioned by the MPA? It's a study that they
10 provide any industry subscriber who wants to then take
11 a copy of this study and use whatever data is in that
12 study. Is that a source of the Nielsen study?

13 MR. OLANIRAN: I have to confer for one
14 second.

15 JUDGE CAMPBELL: Absolutely.

16 MR. OLANIRAN: Confer please.

17 JUDGE CAMPBELL: Absolutely, absolutely.

18 (Whereupon, the foregoing matter went off
19 the record at 3:17 p.m. and went back on
20 the record at 3:20 p.m.)

21 MR. OLANIRAN: Your question was whether
22 or not we commissioned the Nielsen study. The way

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1 that I understand the Nielsen's work is they've
2 already gone out and done a study of viewing.

3 JUDGE CAMPBELL: And they make it
4 available to --

5 MR. OLANIRAN: And they make it available
6 to people that are interested. And we may give them
7 some specifications as to what we're interested in,
8 for example, some counting analysis, which I think
9 will provide the documents that we gave Nielsen in
10 that regard to IPG. So, to that extent, yes, but we
11 don't commission Nielsen to go out and --

12 JUDGE CAMPBELL: Now, that was the essence
13 of it. A, is it a commissioned study where if it were
14 a commission study we'd certainly be able to ask for
15 backup. If it's a resource material study offered to
16 members of the industry or whomever's willing to pay
17 whatever it takes to get it, that's different. And
18 that was my question. Thank you.

19 MR. OLANIRAN: And the other -- I'm not
20 done yet. I think I touched on the prior proceedings.
21 The final point that I wanted to make is with regard
22 to section 251.48(e) of the rules, which pertains to

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1 this documented survey as evidence. And if we get
2 past the point and even assume that this is survey
3 evidence, there are certain criteria that you have to
4 meet. And it goes to my point earlier that we have
5 not introduced the Nielsen study. So, there's no
6 reason to comply with some of the information that
7 they're asking for.

8 Now, by contrast, IPG has a distribution
9 methodology which they have clearly put into evidence
10 which we sought information, for example, about how
11 they derive their sample. The Copyright Office came
12 back and told us, "Well, you're not entitled to it
13 right now. And I believe that was the October -- I'm
14 sorry, the September 13 order, probably the last page,
15 which dealt with our interest in how they derive their
16 samples. We would deny that.

17 So, we don't think we've put the Nielsen
18 -- we certainly have not put the Nielsen study into
19 evidence, and they have put their study into evidence.

20 JUDGE CAMPBELL: Thank you. Mr. Lutzker,
21 did you have one brief point?

22 MR. LUTZKER: Yes, I have a few brief

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1 comments. First, the history of the CRT in CARP
2 proceedings have made clear, have made clear that MPA
3 commissions a study from Nielsen with regard to data
4 collected that is focused on information that they use
5 in these CARP proceedings. And in our brief, we have
6 a reference from the 1990 -- 1989 cable proceeding in
7 which one of the commissioners in the trench, which is
8 attached to our case, is commenting to the effect,
9 "Now, I understand that Nielsen is a separate
10 organization. It is not part of MPA. You make
11 contracts with them." And he goes on to describe the
12 nature of those arrangements are the preparation of
13 specialized assembly of data.

14 Yes, Nielsen goes out, the broadcast
15 industry pays Nielsen for the collection of data with
16 regard to ratings information. But Nielsen does not
17 have a study of distant viewing signals preselected by
18 MPAA that is in a package sort of like program one you
19 pull out and you get this. MPAA has for many years
20 negotiated with Nielsen for a price. They pay a lot
21 of money for a study from Nielsen that focuses on and
22 assembles particular data that is part of a Nielsen

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1 collected information but is focused in a way that
2 helps the MPAA assess program viewing on a distant
3 signal basis in cable households that are not local
4 for purposes of copyright rules and FCC definitions.

5 And it is mind boggling to suggest that
6 this is not a special study commissioned, contracted
7 for by the Motion Picture Association. There are
8 communications back and forth, and one of the
9 documents that was provided is -- that was earlier
10 provided goes to particular selections of counties.
11 Because under the copyright rules and then the FCC
12 rules as you sort of merge them together, signals are
13 local for certain purposes. They are significant
14 viewed signals.

15 You have to sort of define carriage very
16 particularly, and they don't want -- if it's a signal
17 from Atlanta, they don't want certain counties which
18 are within the 35 mile zone or a signal that
19 significantly viewed. So, they provide information to
20 Nielsen, "This is the data we want." It is a unique
21 position, in my opinion, in connection with these CARP
22 and CRT proceedings for the MPA to suggest that this

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1 is data that Nielsen has offered without their input.
2 This is contracted for. This is commissioned data.

3 Is this study -- is this Nielsen study
4 part of this record? Absolutely. There is nothing
5 clearer than this Nielsen study is fundamentally part
6 of the MPA proceeding. For them to suggest that, it
7 is not because we didn't have a phase one proceeding.
8 Oh, in phase one, we go into a lot of detail. But in
9 phase two, we don't.

10 In phase one, you go into a lot of detail.
11 If there's no phase one proceeding, then we are
12 functioning as a phase one proceeding with regard to
13 some of the aspects of this information. We are
14 entitled to the data. And more fundamentally, because
15 this is a program by program specific analysis of the
16 Nielsen data, coupled with the CDC data, coupled with
17 the TV data logs, integration of this information is
18 absolutely essential.

19 So, I mean, I would think it would be a
20 serious mistake to suggest at this stage of after
21 almost 20 years of copyright royalty proceedings that
22 the Nielsen is not entered in evidence in the phase

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1 two proceeding by the MPA by introduction of their
2 direct case, by the introduction of the related
3 material.

4 You had it exactly right. If it's a
5 commissioned study, we're entitled to the underlying
6 documents. If it's not a commissioned study,
7 different question. But it is a commissioned study,
8 number one. Number two, the Copyright Office in its
9 order of the 10th of October spoke directly to this
10 point when it deals with both the combination of
11 whether Ms. Kessler was responsible.

12 Whether she relied upon that data is not
13 the point. She does rely upon -- MPA relies upon the
14 data in developing its position, and the Copyright
15 Office has said we are entitled to these documents
16 whether they're in your custody or control or not.

17 They know -- they've known this for the
18 better part of a decade that Nielsen's possession of
19 this information is something that they may need to
20 discord during discovery procedures and during the
21 cases. And if they don't, the Copyright Office, the
22 Copyright Tribunal has held them accountable for that.

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1 And we are entitled to household numbers. We were
2 entitled to it. It hasn't been provided. We're
3 entitled to the sum and substance which gets Nielsen
4 to the numbers that they get to.

5 Because remember, I mean we're dealing
6 with a lot of money in this proceeding. There's a lot
7 of money, and if we were in a federal court case
8 involving 50, \$60,000 of disputed ownership of
9 material, plaintiffs and defendants would have a lot
10 of opportunity for discovery through interrogation for
11 getting to the bottom of this. We're dealing with
12 tens of millions of dollars in this proceeding, more
13 than tens of millions of dollars. And the bottom line
14 is --

15 MR. GALAZ: Sorry, I have to get going.

16 JUDGE CAMPBELL: Thanks.

17 MR. LUTZKER: -- the bottom line is that
18 this is part and parcel to their case. We've asked
19 for it, it's been compelled, it hasn't been delivered.

20 JUDGE COOLEY: You said, Mr. Lutzker, if
21 it is not a commissioned study, then that is a
22 different question. What do you mean by that?

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1 MR. LUTZKER: Well, if it's an off-the-
2 shelf item and they go and buy it off the shelf, there
3 may be -- I mean, I'd have to sort of think through
4 how far we need to go with that. It does go to issues
5 of ownership and control in a relationship, but the
6 nature of the relationship I think is quite different.

7 JUDGE COOLEY: Well, now I understood them
8 to say that it was not a commissioned study, so we are
9 at least we have an issue as to whether it is or not.
10 Am I missing something here?

11 MR. LUTZKER: Well, I mean I'm perfectly
12 comfortable with your trying to assess -- I mean, that
13 may be an issue. What I heard before that it's not a
14 commissioned study I found, frankly, surprising.

15 JUDGE COOLEY: Well, we may be dealing
16 with that issue now that you raised. What if it isn't
17 a commissioned study? What do we do? Or what is your
18 relief? What are you seeking?

19 MR. LUTZKER: Well, again, the question is
20 has this study been introduced into evidence in this
21 proceeding, okay? Is it relied upon for bottom line
22 information? And I think in the end the answer is

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1 yes. I think we are entitled to probe beyond the
2 surface.

3 If they introduce an off-the-shelf study
4 that says, you know, that a particular group of
5 programs are the most highly watched programs in the
6 history of television, and here's a study that shows
7 these five television shows. They have quotes in
8 magazines and newspapers. These five programs -- and
9 low and behold these five programs are all represented
10 by MPAA.

11 Now, are we entitled -- how far can we go
12 in testing that information? How many people were --
13 I think we have some entitlement and then maybe some
14 limits. What sort of -- we're entitled to go at least
15 as far as they go, and then you, as a Panel, can put
16 weight on that, okay? There's a point at which I
17 don't the Copyright Office would require them to go to
18 great expense. They don't need to replicate things.
19 But if they're quoting from People Magazine that says
20 the top five rated shows in the history of television
21 are A, B, C, and D, it is what it is.

22 Are we entitled to go beyond that? Are we

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1 allowed to say where did that come from? Can we go
2 two and three steps removed to get how many people
3 were surveyed or how did they make that particular
4 judgment? The answer is there obviously are some
5 limits. They provided us the source of material, and
6 they're relying upon it in a particular study. They
7 didn't commission it, so they didn't sort of say, "Go
8 find me the top five programs in the history of
9 television." They said, "We found it in People
10 Magazine." You're free to go to People Magazine just
11 as we are. In that situation, I think they might have
12 a legitimate case.

13 JUDGE COOLEY: So, is it your argument
14 that we have to -- the Panel has to come to a decision
15 as to, I guess, some way whether it was a commissioned
16 study. If it's a commissioned study, it's your
17 position that they should --

18 MR. LUTZKER: Absolutely.

19 JUDGE COOLEY: -- seek to provide you with
20 the underlying data. If it not a commissioned study,
21 I'm trying to get what your argument is. I think it
22 is that you may have a responsibility, if you want the

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1 information, you have to get it on your own.

2 MR. LUTZKER: I mean, I think, frankly, I
3 haven't thought about that, because I believe it is
4 clear from prior rulings, from prior CARP/CRT
5 proceedings that the MPAA engages Nielsen to produce
6 a special study. It provides specific information
7 which creates the demographic mix that works for them
8 with respect to distant, local signals. They
9 eliminate all local viewing in their study or at least
10 they should if they don't want to sort of run afoul of
11 the definitions under copyright law. So, that in and
12 of itself is not drawing upon something that Nielsen
13 has sitting on the shelf.

14 Nielsen has all this data assembled,
15 billions of bits of data, and MP says, "All right, I"
16 -- MPA says, "I want you to sort of structure this --
17 I want you to pull this amount of data from your files
18 and give it to me, and we're going to call that the
19 Nielsen special study.

20 Now, if that's not commissioning it, then
21 I think -- you know, I think that -- you know, I think
22 it creates a fantasy world to suggest that they have

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1 not designed this, they've not negotiated with
2 Nielsen. They rely upon Nielsen's underlying sort of
3 research collection, but they have commissioned the
4 study. They've introduced it. It integrates with the
5 other data to come up with the bottom line viewing
6 hours.

7 JUDGE COOLEY: And if I might, Madam
8 Chair, I just want to ask Mr. Olaniran a question.

9 JUDGE CAMPBELL: Please do.

10 JUDGE COOLEY: I think an issue's been
11 raised as to whether or not this is a commissioned
12 study. I heard you say, I believe, a while ago that
13 it is not a commissioned study. Now, maybe commission
14 is the wrong word to use. Did you contract specially
15 or separately with Nielsen to do something like what
16 Mr. Lutzker said, select out information and give it
17 to us so we can use it in this proceeding?

18 MR. OLANIRAN: Yes, we did. We contracted
19 with Nielsen to give us the Nielsen study. However,
20 I think when Madam Chair asked whether we commissioned
21 a study I think the question with her question focused
22 on whether or not we asked Nielsen to go out and do

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1 this study and then report back to us. I think Mr.
2 Lutzker actually just answered the question when he
3 said the information is already in Nielsen's database
4 -- I'm sorry?

5 JUDGE CAMPBELL: Yes.

6 MR. LUTZKER: Oh, I'm sorry. The
7 information is already in Nielsen's database. We
8 commissioned to the extent you want to use commission
9 -- we contracted, I guess is probably a better
10 description -- we contracted with Nielsen to generate
11 a report based on certain parameters. They give it to
12 us. Nielsen sells the report, sells their database
13 information to anybody that wants to buy it.

14 Secondly, the Copyright Office did not
15 rule on the issue that they're referring to as far as
16 underlying documents to the Nielsen study. The
17 Copyright Office order deals directly and specifically
18 with the Nielsen study.

19 Third, if they are now arguing that this
20 is a 251.48(e) issue, meaning we have put the Nielsen
21 study into evidence, then you'd have to go to the
22 September 13 ruling, which says they're not entitled

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1 to that information.

2 JUDGE CAMPBELL: My question to you was in
3 fact commissioned with regard to MPAA does not
4 commission Nielsen to go out and gather data. That is
5 what Nielsen does. They have an entire library of
6 data, whether it's on a database or in hard copy, and
7 you go like you would -- when you go to Library of
8 Congress, say please get me this, this, this, and
9 this.

10 MR. OLANIRAN: Precisely.

11 JUDGE CAMPBELL: A, B, C, and D. Or
12 tomorrow I might want F, G, H, and I out of your
13 database.

14 MR. OLANIRAN: Yes.

15 JUDGE CAMPBELL: But you never commission
16 them to create the database. It's almost like a
17 library. You go and you ask for it, and you get it
18 back. It's like going to the Library of Congress and
19 getting information. They already have it; they
20 collect it; it's there. You want it; you get it. You
21 either buy it or whatever. It's like going to the
22 grocery store. You've got all sorts of produce.

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1 Today I want oranges and apples. Can you get them for
2 me? Tomorrow I want bananas and grapes, but you
3 didn't ask them to put the produce store together.

4 I think that's my understanding of what
5 Nielsen is. They gather the data; it's there. All
6 sorts of different groups can come and ask for data,
7 but they're gathering it notwithstanding whether
8 you're going to ask them for it or not. It's there;
9 it's available.

10 MR. OLANIRAN: Right. I agree with that.

11 JUDGE COOLEY: May I ask another question
12 then? Do you have the underlying data in your --
13 Nielsen data in your possession; that is the data that
14 underlies this thing that we've been calling the
15 special study?

16 MR. OLANIRAN: No, we do not.

17 JUDGE COOLEY: Do you have -- do you have
18 access to that information through Nielsen?

19 MR. OLANIRAN: As far as I know, we do
20 not. The information that we provided to Nielsen we
21 have given to them, the parameters.

22 JUDGE CAMPBELL: The request.

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1 MR. OLANIRAN: The request.

2 JUDGE CAMPBELL: The request for
3 households in 45 counties in 48 states or whatever --

4 MR. OLANIRAN: Right.

5 JUDGE CAMPBELL: -- those requests are.

6 JUDGE COOLEY: So, is it your position on
7 this issue here that if he wants the information, he
8 should go to Nielsen to get the underlying data?

9 MR. OLANIRAN: Precisely.

10 JUDGE COOLEY: Okay.

11 JUDGE CAMPBELL: If they'll even provide
12 it, correct?

13 MR. OLANIRAN: If they'll provide it.

14 JUDGE CAMPBELL: I don't know from your
15 discussion here whether they provide that or not.
16 Thank you.

17 MR. OLANIRAN: Thank you.

18 MR. LUTZKER: I respectfully disagree on
19 several points. First, I think the suggestion that
20 MPAA -- and if you look at the history of the CRT and
21 CARP proceedings, MPAA, working with Nielsen, designed
22 the study over a period of time. Nielsen was intimate

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1 with representatives of MPAA. Alan Cooper was
2 involved in this analysis in the early '80s. Look at
3 the history of CARP, it is absolutely a mistake to
4 think that Nielsen's study is not a personally direct
5 MPAA commissioned document.

6 In the course of prior proceedings, the
7 effort at obtaining information from the files, the
8 joint support claimants in the 1990/1992 proceeding
9 went after much of the same type of information, and
10 the CARP Panel -- and I urge you to look at that
11 history -- the CARP Panel required the information to
12 be provided. The PBS made claims with respect to
13 this.

14 These documents are under the control of
15 MPAA for purposes of this proceeding. These are not
16 readily available. They come at a specific designed
17 cost. They may or may not engage in data manipulation
18 based upon theories, criteria, presumptions,
19 information laid down at the behest of MPAA. What is
20 clearly in our view wrong to suggest that this is data
21 that is not contracted for and part and parcel to the
22 MPAA documents in this case.

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1 JUDGE COOLEY: Let me ask you a question.
2 I think anybody can answer this. Isn't this
3 underlying data highly relevant to these proceedings
4 or will become? It seems to me that if you don't go
5 forward with this data, you're going to introduce your
6 report into evidence. He's going to try to cross
7 examine on this evidence. We're going to find out
8 there's nothing really under it, that we don't have
9 the underlying data that we need, we may need, I don't
10 know what we're going to need. We may need it. It
11 seems to me then that we're going to be having a long
12 rebuttal case here with the data being produced in the
13 rebuttal case when maybe we should just deal with it
14 up front. Anybody want to answer that question?

15 MR. LUTZKER: Well, I think what we've
16 tried to say is we have tried to deal with it up
17 front. And, I mean, if you take the sum total of all
18 the things we're asking for by these various motions,
19 the resources of Raul Galaz and the Independent
20 Producers Group could be overwhelmed by an amount of
21 documentation in the weeks before a hearing.

22 They had their chance. If you conclude

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1 that we're correct, that we asked for the documents,
2 the Copyright Office compelled it, they were obligated
3 to deliver, and they didn't deliver it, the first
4 thing that we need to do is focus on their direct case
5 and determine what parts of their direct case need to
6 be stricken for failure to provide documentation.
7 That's what we're asking for. If their case is faulty
8 because they have not provided information that they
9 were obligated to provide, they've got to suffer the
10 consequences during the course of the hearing, and
11 part of that is the striking of claims and factual
12 statements at this stage.

13 If we are wrong and you rule and you
14 reject our motions and they're correct, then the case
15 goes forward. They can't introduce the documents
16 later. If it does turn out that it's relevant, I
17 mean, you know, at that point it goes to the other
18 aspects.

19 But, again, we're not asking for the -- we
20 asked for the document production. We sought -- filed
21 motions to compel the document production. We
22 obtained orders from the Copyright Office for

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1 compelling production. If it hasn't been produced
2 now, in our view, it's too late to, because you're
3 right. This is not rebuttal testimony. This is not
4 something -- we have a very tight timetable to deal
5 with this proceeding.

6 We had the right to sort of know this
7 information, test it, analyze it, and go into a
8 hearing capable of dealing with the documents they
9 provided. If this is part of their case and they
10 haven't provided it, then they need to bear the
11 consequences of that.

12 MR. TUCCI: Your Honor, could I address
13 that very briefly?

14 JUDGE COOLEY: Sure.

15 MR. TUCCI: We don't know, sitting here
16 right now, what Mr. Lutzker is looking for. But I can
17 tell you that if he's looking for the Nielsen diaries,
18 if he wants the copies of the diaries that are kept in
19 the households in Florida, that the person sitting
20 there fills them out, Nielsen won't give them to them.
21 Nielsen won't give them to us. I mean, if he's
22 looking for the design of the study, that's

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1 proprietary to Nielsen. That is never going to become
2 an issue in this proceeding, because it's never going
3 to see the light of day.

4 I don't know what else can be provided.
5 Maybe he can enlighten us as to what it is exactly
6 that he's looking for, but we've been at this for an
7 hour and 15 minutes on this particular issue, and I
8 haven't heard one document being offered up as being
9 relevant in these proceedings. We take the results of
10 a study and use it; that's it. It's like looking a
11 number up in a telephone book.

12 MR. OLANIRAN: In addition to which we're
13 not introducing the Nielsen study.

14 MR. TUCCI: Right. And the quote --

15 MR. OLANIRAN: Again --

16 MR. TUCCI: I'm sorry.

17 MR. OLANIRAN: -- you've described how we
18 utilize the Nielsen study. We're not introducing the
19 Nielsen study into evidence.

20 MR. TUCCI: In the 1990 proceeding, he was
21 referring to introducing --

22 MR. OLANIRAN: If you look at Exhibit 8,

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1 which they use -- if you look at Exhibit 8, the
2 transcript that they attach, if you go down to the
3 second full paragraph, the sentence that starts with,
4 "I think that," it says, "I think that Mr. Scheiner
5 hasn't put this study in, haven't had its witnesses
6 come in here and say that this is the true measure of
7 marketplace value." So, obviously, the study was put
8 in in that proceeding. We have not put this study in.

9 And to the extent that we intend to put it
10 in, in the September 13 order, the Copyright Office
11 already told us what we have to comply with to do
12 that.

13 MR. LUTZKER: If I may address that. The
14 purpose of discovery is the exchange of documents the
15 parties can use for testing the assertions and claims
16 in the proceeding. The MPA may feel, a, that they
17 haven't introduced this document into the proceeding.
18 We feel they have. They rely upon Nielsen data, they
19 rely upon this Nielsen study, and the underlying
20 support of that study needs to be provided to us as a
21 claimant.

22 We can, by cross examination, get the

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1 documents into the case. I'm not worried about
2 getting documents into the case. They may choose not
3 to put the alpha list in the case. We can question
4 Ms. Kessler. It's in the case. We have it; we can
5 use it. Same thing with regard to the Nielsen study.

6 I am handicapped in knowing precisely what
7 I want, because if they had been forthcoming and done
8 a sufficient data transfer to us in electronic format,
9 what documentation does CDC have from Nielsen? How
10 does CDC make interpolations to get from A to B to C
11 to 67,412 viewing hours? If we don't have all the
12 documents that's available to make that analysis, we
13 are handicapped in this proceeding.

14 They may say it's not in evidence in this
15 case. In our view, it absolutely is. The Nielsen
16 study has always been, if you read prior CARP
17 proceedings and they've incorporated by reference
18 those proceedings, the single most important piece of
19 evidence is their Nielsen study, what you characterize
20 it now as the MPA viewer study. It's a merger of
21 information, the foundation of which is Nielsen
22 ratings.

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1 Their study, their whole claim, what it
2 boils down to, is ratings. One program is rated
3 better; therefore, it gets more money. And if you're
4 saying that the source of the ratings that they
5 commissioned for specific community analysis in the
6 cable industry is not in evidence in this case, then
7 I've got a harder case than I thought I had.

8 I mean, as a practical matter, that's
9 their case. It's a good case. The proceedings in the
10 past have said it's a good case. They just don't want
11 to provide us the information that can allow us to
12 test it when you get to phase two, because phase two
13 something happens. You go from the macro to the
14 micro. You go from an analysis of billions of hours
15 in particular categories to dozens of hours in
16 individual categories. And if I can't say how
17 reliable is this piece of information that you're
18 using, how reliable is this, and then the summation is
19 a bunch of these reliable or unreliable pieces of
20 information.

21 If I can't do that, my case is hurt,
22 frankly, because I think that there are flaws with

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1 respect to this study that have been pointed out in
2 past proceedings that they know about, that they've
3 dealt with Nielsen about, that they have -- I don't
4 know all the details for '97 because it's not in the
5 record yet but we'll get on cross examination,
6 perhaps, how has the study changed from '90 to '92?
7 Has it changed? Has it changed the target? There
8 have been critiques of the Nielsen study over this
9 period of time. Does it remain consistent every year,
10 unchanging? They've referenced prior documents. They
11 haven't referenced other documents, because there's no
12 -- there wasn't a -- there was an '89 cable. Then you
13 had the '90 to '92. There's nothing from '93, four,
14 five, and six. Have there been changes?

15 We're entitled to this information. I
16 think I am handicapped, certainly, and I think Mr.
17 Tucci is correct to the extent that we haven't been as
18 specific and detailed. We asked; they provide. They
19 provided; we asked again. We see some gaps, we ask
20 for some more. And the burden is on them to produce
21 the documents to us. We've done a data dump. They've
22 provided certain documents. We feel those documents

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1 are lacking.

2 Now is the point, a day of reckoning.
3 Have they provided enough information? Do you feel
4 that at this point, at the close of discovery --
5 discovery closed months ago. The only issues on this
6 data transfer that happened after May had to do with
7 was there a protective order? What was the
8 confidential information? That was the issues. It
9 wasn't -- we had questions about accessing
10 information, which posed some additional unique
11 issues, but the data dumps have been made. People are
12 going about their business. Thanksgiving passed,
13 we're heading for Christmas, and then the hearing
14 starts.

15 Okay. We're at this stage. Now what
16 happens? Do we have enough information, in your view
17 -- do you feel we have enough information? Well, do
18 you feel we have enough information? And then, you
19 know, whether the hearing will show differently or
20 not, who knows? We're saying in advance of the
21 hearing it's obvious, it's obvious we don't have
22 enough information. They've got it, and they've been

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1 tested about this in prior proceedings. Now's the
2 time to come to reckoning.

3 JUDGE COOLEY: I just have a very brief
4 question. In MPAA's direct case, Exhibit 3, which I
5 think is what we've been talking about, there's a
6 listing of 81 pages of programs, number of broadcast
7 programs, and type. Where does the information
8 supporting the number of broadcasts come from? I've
9 seen part of this in an alpha list, but alpha list has
10 other things. How can I really know that the Andy
11 Griffith Show had 3,914 broadcasts in 1997?

12 MS. KESSLER: I believe the answer, Your
13 Honor, is that the number is tabulated probably from
14 the TV data data.

15 JUDGE COOLEY: Okay. That answers my
16 specific question.

17 MR. LUTZKER: In answer to that specific
18 question, the underlying documents -- the only
19 underlying documents identified in response to
20 discovery was the 1997 cable claims filed with the
21 Copyright Office.

22 JUDGE COOLEY: I understand. Thank you.

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1 JUDGE CAMPBELL: Now, it's my
2 understanding that we have finished all of our
3 discussion today on the Independent Producer Group's
4 motion to strike testimony and preclude introduction
5 of evidence. We had some other motions yesterday. We
6 weren't sure which ones were going to be resolved
7 today.

8 Mr. Lutzker, you had advised us yesterday
9 and very obviously that you had not had a chance to
10 look at all of these motions. Were you able to
11 discern whether there were any more that we could
12 fully today or do we need to go through more of the
13 pleading cycle beforehand?

14 MR. LUTZKER: I think if it's okay, I
15 mean, I did take a quick look. I don't even -- I mean
16 I've obviously been focusing on the most immediate
17 things, and if I could I'd like to just have -- from
18 my point of view, we can handle them in the pleading
19 cycle. I don't think that we need oral argument.

20 MR. TUCCI: I would agree, Your Honor,
21 especially the motion to reconsider and the motion for
22 additional discovery. I think we've talked about them

1 pretty extensively yesterday, and I'm not sure that if
2 I was standing up and arguing them right now I would
3 add anything that I didn't say yesterday.

4 JUDGE COOLEY: Excuse me, Mr. Tucci. We
5 discussed MPAA's motion to reconsider. I think this
6 is IPG's motion --

7 MR. TUCCI: Exactly. IPG's, correct.

8 JUDGE COOLEY: And we didn't reach that
9 part of it.

10 MR. LUTZKER: Yes. I mean I think that --
11 I don't think the issues that we posed in our pleading
12 were -- let me do this: If I could take like five
13 minutes, I'll reread their brief and see if it's
14 something that I want to sort of --

15 JUDGE CAMPBELL: That's fine.

16 MR. LUTZKER: -- ad lib a response to.

17 JUDGE CAMPBELL: That's fine.

18 MR. LUTZKER: I don't feel I can deal with
19 the additional discovery things. I just really
20 haven't -- I did read them very quickly this morning,
21 but I frankly can't even remember -- I know you want
22 them for discovery, but I just would have to -- I'd

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1 prefer to deal with that at least on a piece of paper.

2 JUDGE COOLEY: I tell you what: Maybe we
3 can have this brief CARP meeting right now and come
4 back.

5 JUDGE CAMPBELL: Well, you want to see if
6 she's available? If she's available, then we'll --
7 she said she might at least -- that would help her if
8 we could do that now. Why don't we do that. We'll
9 check and see if we can have our meeting, and then
10 we'll come back here at quarter after four. If we
11 have to any discussion, that should give us sufficient
12 time to get it done by five, I would think.

13 (Whereupon, the foregoing matter went off
14 the record at 3:55 p.m. and went back on
15 the record at 4:20 p.m.)

16 JUDGE CAMPBELL: Please be seated. So,
17 where are we?

18 MR. LUTZKER: What I would suggest is that
19 I will -- I did a quick read, and I'd like to just
20 sort of file a piece of paper so you have the whole
21 thing. We'll close the cycle. And on the others, I
22 didn't try to revisit the discovery. I certainly want

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1 to have an opportunity to think about it, just to give
2 you the benefit that I have a little reflective time
3 on it, and I'll put it down on paper.

4 JUDGE CAMPBELL: That's fine.

5 MR. TUCCI: As I stated, I was talking
6 about actually Mr. Lutzker's motion for
7 reconsideration and our motion for additional
8 discovery. We're perfectly happy to submit those on
9 our pleadings, our opposition to the one and our
10 motion with respect to the additional discovery. We
11 will submit those in the pleadings.

12 JUDGE CAMPBELL: So, everyone's in
13 agreement that these will follow through the pleadings
14 cycle in paper form.

15 MR. LUTZKER: Right.

16 JUDGE CAMPBELL: Good.

17 MR. OLANIRAN: We agree on something.

18 MR. TUCCI: Took us till 4:23.

19 (Laughter.)

20 JUDGE CAMPBELL: We're delighted that
21 there is a spirit of agreement happening here.

22 Now, if you remember your schedule for the

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1 next set of hearings. Is there nothing else that
2 we're going to cover today? Think about it while I
3 keep talking about the hearing schedule. We will
4 reconvene after this day closes. We will bring our
5 hearings in January, on January 8 at 9:30 a.m.; is
6 that correct? Everybody understands that, in this
7 room.

8 Are there any other questions or matters
9 to be brought up today?

10 JUDGE COOLEY: I do. I'd just like to
11 know if anybody is contemplating filing any motions
12 before we come back again? I mean do you have any
13 motions in the mill right now?

14 MR. TUCCI: We have none in the mill right
15 now. It is likely, though, based on some of the
16 representations that were made yesterday with respect
17 to the WSG California Artist Collection Group
18 relationship that we will file one additional
19 discovery request. Because we had originally filed a
20 discovery request. It was denied, because of
21 representations that were made in the pleadings that
22 I think were at the odds with the representations that

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1 were made yesterday. So, I think that we're entitled,
2 basically, to renew our prior discovery request.

3 JUDGE CAMPBELL: Based on clarification.

4 MR. TUCCI: Yes. It will be very limited.
5 It will be very narrow. That's the only thing that we
6 are even contemplating filing.

7 JUDGE CAMPBELL: I want to thank everyone
8 who has been here today and yesterday. I know that
9 the discussions have been challenging for you from
10 time to time. But please realize that they've been
11 helpful to the Panel. And I am certain that as a
12 result, eventually it will help all of us arrive at a
13 result that will be fair to all the royalty
14 recipients, and that again is our charge.

15 The Panel had a discussion about this
16 yesterday, and we've had brief discussions before. We
17 want to compliment the lawyers on their legal analysis
18 and preparation, both on paper and orally. We've been
19 impressed. It's been very helpful.

20 We do have a recommendation, though. The
21 case encompasses a variety of issues. In briefs, the
22 legal analysis is exemplary on both sides. But we

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1 found that contentious descriptions and comments are
2 distracting. And they create an environment that
3 tends to detract from the credibility of the
4 arguments. And it makes it difficult for us to get
5 back to where you are really seeing your major focus.

6 So, while drafting in the future for this
7 CARP Panel, perhaps the lawyers would consider
8 eliminating personal comments, continue to focus on
9 the facts, issues, law, and legal conclusions.
10 Certainly the CARP would find this methodology helpful
11 in its review of your position. And it expects that
12 additional review of the materials in the future by
13 all parties here or parties elsewhere will be assisted
14 by the clarity and focus provided by a less
15 personalized analysis and argument.

16 Again, your legal analysis is exemplary,
17 and that has been very, very helpful on both sides.
18 You have been so gracious and diplomatic here that
19 when we read the documents, sometimes we wonder if
20 they were prepared by the same people. So, if you
21 could take your professionalism, grace, and dignity,
22 matched with your legal skills, and keep that on paper

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1 in the same way, I'm sure that not only would it be a
2 shining example to others but it would help us as
3 we're sifting through all of these details.

4 So, have a happy holiday, whatever
5 holidays you might be enjoying, and I urge you to
6 enjoy as many as possible, religious and/or otherwise.
7 And have a happy new year. Be safe in your travels.
8 And we will look forward to seeing all of you on the
9 8th of January. Thank you.

10 (Whereupon, the oral arguments were
11 concluded at 4:25 p.m.)
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CERTIFICATE

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 Distribution of 1993, 1994, 1995,
 1996 and 1997 Cable Royalty Funds,
 Docket No. 2000-2 CARP CD 93-97

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: December 12, 2000

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
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